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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GENERAL ATOMIC COMPANY,
Appellant,

v.

UNITED NUCLEAR CORPORATION

and

INDIANA & MICHIGAN ELECTRIC COMPANY,
Appellees.

On Appeal from the Supreme Court of New Mexico

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 11,988

UNITED NUCLEAR CORPORATION,
Plaintiff-Appellee,

vs.

GENERAL ATOMIC COMPANY,
Defendant-Appellant,

and

INDIANA & MICHIGAN ELECTRIC CO.,
Defendant-Appellee.

and

No. 12,052

UNITED NUCLEAR CORPORATION,
Plaintiff-Appellee,

vs.

GENERAL ATOMIC COMPANY,
Defendant-Appellant,

and

INDIANA & MICHIGAN ELECTRIC COMPANY,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY, EDWIN L. FELTER, *District Judge*

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OPINION

PAYNE, Justice

This is an appeal from a default judgment entered against General Atomic Company (GAC) in Santa Fe District Court for its alleged willful and bad faith failure to comply with the court's discovery orders.[1]

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[1] This case has been the subject of a number of previous decisions of this Court: *United Nuclear Corp.* v. *General Atomic Co.*, 93 N.M. 105, 597 P.2d 290 (1979) (upholding trial court's refusal to stay its proceedings pending arbitration), *cert. denied*, 444 U.S. 911 (1979); *United Nuclear Corp.* v. *General Atomic Co.*, 91 N.M. 41, 570 P.2d 305 (1977) (upholding personal jurisdiction of trial court over Detroit Edison Company); *General Atomic Co.* v. *Felter*, 90 N.M. 120, 560 P.2d 541 (1977) (upholding injunction prohibiting the parties from instituting related actions in other

This case is by far the single largest litigation in the history of New Mexico, both in terms of the dollar value of the judgment, which approaches one billion dollars, and the sheer volume of the record, which contains more than 28,000 pages in the record proper, 13,000 pages of transcripts, thousands of documents, and over 100 depositions containing approximately 16,000 pages of testimony and 2,700 exhibits. The facts are largely disputed and are extremely complex. Although we begin with a general factual background and summary of the proceedings below, additional factual details are contained in the separate discussions of the issues raised on appeal.

This action was instituted by United Nuclear Corporation (United) against GAC, a partnership made up of Gulf Oil Corporation (Gulf) and Scallop Nuclear Cor-

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courts), *rev'd, General Atomic Co.* v. *Felter*, 434 U.S. 12 (1977); and *United Nuclear Corp.* v. *General Atomic Co.*, 90 N.M. 97, 560 P.2d 161 (1976) (upholding personal jurisdiction of trial court over GAC). In addition, this Court refused to consider the issue of the disqualification of United's counsel as either an appeal from a final judgment or as a petition for an extraordinary writ (No. 11,469, June 29, 1977, and No. 11,484, July 1, 1977, respectively).

In addition to the two decisions mentioned above which were taken to the United States Supreme Court, that Court has had this case before it on at least three other occasions. On May 30, 1978, the Supreme Court held that the trial court could not enjoin GAC from proceeding with its right to arbitration against United. *General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978). GAC applied for a stay of all proceedings in the trial court on the basis that the threat of sanctions under Rule 37 violated the act of state doctrine. This application was denied. *General Atomic Co.* v. *Felter*, 435 U.S. 920 (1978). After sanctions were imposed, GAC sought immediate review by the Supreme Court of the sanctions order and default judgment. This petition was also denied. *General Atomic Co.* v. *Felter*, 436 U.S. 904 (1978).

poration (Scallop).[2] Scallop is a wholly-owned subsidiary of Dutch-Shell Oil Company. As amended, United's complaint sought a declaratory judgment that two contracts under which United was to supply approximately twenty-seven million pounds of uranium to GAC were void and unenforceable. The complaint alleged that GAC and Gulf committed fraud and economic coercion, breached their fiduciary duties to United, and violated the New Mexico Antitrust Act. United also contended that its performance under the contracts had been rendered commercially impracticable. GAC counterclaimed for actual and punitive damages for United's alleged violations of the New Mexico Antitrust Act, and for specific performance of the two contracts, or alternatively, for damages of almost eight hundred million dollars.

GAC impleaded Indiana and Michigan Electric Company (I&M), a public utility company which provides electrical service to customers in the states of Indiana and Michigan. GAC contended that if United's obligations to supply uranium to GAC were excused, GAC's obligations to supply uranium to I&M from the supplies United was to deliver should also be excused.[3] I&M counterclaimed against GAC for specific performance and for other relief.

The trial of this case began on October 31, 1977. It was terminated on March 2, 1978, when the trial judge

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[2] This action was originally filed on August 8, 1975 in Santa Fe District Court. Both GAC and its constituent partners, Gulf and Scallop, were named as defendants in that case. The case was removed to federal district court by Gulf. On December 31, 1975, United voluntarily dismissed the case in federal court, and refiled it on the same day in Santa Fe State District Court, naming only the partnership as a defendant. It is this later case that is the subject of this appeal.

[3] Detroit Edison Company, another electric utility company, was also impleaded by GAC, but was dismissed as a party in March 1978 after it reached a settlement with GAC.

entered a sanctions order and default judgment against GAC. The court found that GAC had exercised "the utmost bad faith in all stages of the discovery process." The court entered forty-eight recitals relating to GAC's discovery failures, twelve findings of fact as sanctions pursuant to N.M.R. Civ. P. 37(b)(2)(i), N.M.S.A. 1978, and a default judgment under N.M.R. Civ. P. 37(b)(2)(iii), N.M.S.A. 1978.[4] The judgment invalidated United's uranium supply contracts with GAC, declared that United had no other obligations to deliver uranium to GAC, and struck GAC's defenses, counterclaims and cross-claims.

A hearing on damages followed, after which the court entered a final judgment, amended final judgment, and second amended final judgment. In addition to invalidating the United-GAC contracts, the court awarded damages to United of $8,264,723 (reduced by an offset for prepayments that had been made) and to I&M of $15,950,752. The court also granted specific performance of I&M's contract for the supply of five million pounds of uranium from GAC.

GAC appeals from the default judgment, arguing ten main grounds for reversal. We have consolidated these points in this opinion into the following five sections: (1) The propriety of the court's discovery orders; (2) GAC's non-compliance with those orders and the propriety of the sanctions entered for noncompliance; (3) the court's failure to disqualify United's counsel; (4) the trial judge's refusal to disqualify himself; and (5) the propriety of the remedies.

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[4] In 1979, most of the specific New Mexico Rules of Civil Procedure with which we are concerned were amended (e.g., Rules 26, 33, 34, 37). Because this case was decided in the court below prior to the adoption of these amendments, all citations in this opinion are to the former rules.

Before turning to the examination of the issues on appeal, we think it appropriate to comment on the conduct of all parties in these appellate proceedings. We have been faced with the difficult task of wading through an avalanche of motions and papers, much of which has done little to add to our understanding of this case or to expedite the ultimate resolution of it. Perhaps because of the longevity of this litigation, the acrimony which marked the proceedings in the trial court, or the monetary value of the judgment at stake, the over six hundred pages of appellate briefs filed, as well as the arguments of the attorneys in the hearings in this Court, have been filled with unnecessary "invectives, maledictions, and denunciations which we ignore." *State of Ohio* v. *Arthur Andersen & Co.*, 570 F.2d 1370, 1372 (10th Cir. 1978), *cert. denied*, 439 U.S. 833 (1978).

After having received the permission of this Court to file briefs which exceeded by several times the length generally permitted by the Rules of Appellate Procedure, N.M.R. Civ. P. App. 9(k)(4), N.M.S.A. 1978, GAC and United resorted to the practice of adding additional argumentative material in a device called an appendix, without requesting or receiving permission from this Court. N.M.R. Civ. App. 9(b) and (k)(4). In addition to argument, the parties inserted other material from outside the record in these appendices, including a newspaper article and correspondence, contrary to the rules, N.M.R. Civ. App. 9(d), and to prior decisions of the Court. *General Services Corp.* v. *Board of Com'rs*, 75 N.M. 550, 552, 408 P.2d 51, 53 (1965); *Porter* v. *Robert Porter & Sons, Inc.*, 68 N.M. 97, 101, 359 P.2d 134, 137 (1961). These we have also ignored.

Although the briefs of all three parties are articulate forensic efforts, each, in one form or another, has failed to fully comply with the rules of this Court. Neither the significance of the issues involved nor the magnitude

of the dollars at stake excuses noncompliance with those rules. We take this opportunity to serve warning on the bar that this Court fully expects compliance with its rules of procedure in general and its specific orders in particular, and will not hesitate to impose the sanctions provided for in N.M.R. Civ. App. 31, N.M.S.A. 1978, in order to secure adherence to the rules and to our orders.

I.

FACTUAL BACKGROUND

To understand the issues in this appeal we must begin with a more detailed factual summary than is usual. Many entities have interacted to create the conditions from which this case arose.

A.

THE GULF URANIUM ORGANIZATION

The principal contract at issue here was entered into by Gulf and United. GAC's predecessor was at one time a wholly-owned subsidiary of Gulf. Most of United's allegations against GAC involve alleged wrongdoing by Gulf. Therefore, an understanding of the issues on appeal must begin with a background of Gulf's activities in the uranium market.

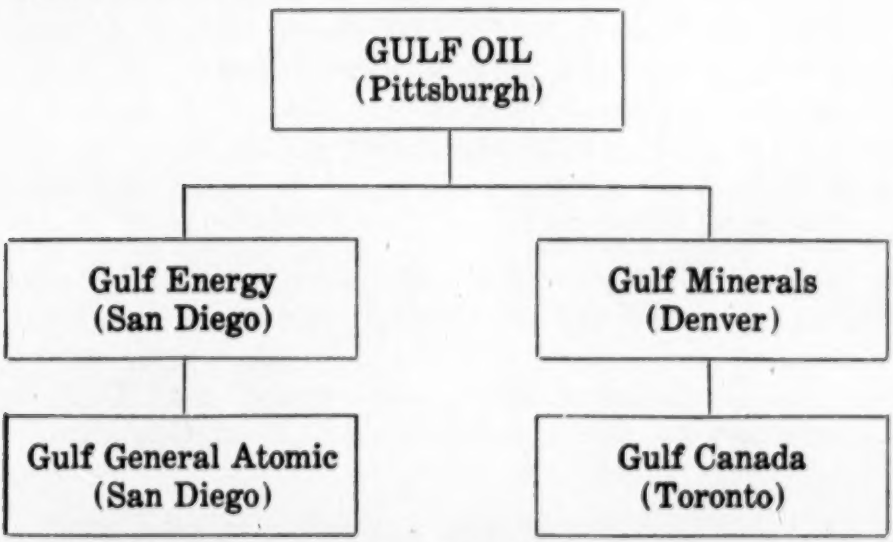
In 1967, Gulf entered the uranium business by purchasing a subsidiary of General Dynamics known as General Atomic. General Atomic, which was a manufacturer of nuclear reactors, was renamed Gulf General Atomic and was operated as a subsidiary of Gulf located in San Diego, California.

In 1970, Gulf formed a new division, called Gulf Energy and Environmental Systems (Gulf Energy). Gulf General Atomic became a part of Gulf Energy. Gulf Energy was the Gulf entity involved in the marketing of

uranium and the manufacture of nuclear reactors. Gulf was the only manufacturer in the United States of high temperature gas cooled reactors.

Beginning in 1967, Gulf undertook the exploration and development of uranium ore bearing properties. A Gulf division located in Denver, Gulf Minerals Resources Company (Gulf Minerals), was charged with this, the production end, of Gulf's uranium business. One of Gulf's first substantial uranium discoveries was made in 1967 in the Rabbit Lake area of Canada. Another wholly-owned Gulf subsidiary, Gulf Minerals Canada Limited (Gulf Canada), was responsible for the development of the Rabbit Lake uranium project. Gulf Minerals had administrative responsibility in the Gulf organization for Gulf Canada's operations.

The following chart outlines the organization, as of 1971, of those aspects of Gulf's uranium business operations which are essential to an understanding of this case.



In addition to its Canadian uranium reserves, Gulf, through Gulf Minerals, began to acquire substantial ura-

nium reserves in the United States. By 1971, it had acquired the Mt. Taylor reserves in New Mexico, which contain the largest body of uranium ore in the United States. Through Gulf Energy, Gulf also began to purchase substantial quantities of uranium on the open market from other uranium producers. Two of such purchase agreements, those Gulf and the present General Atomic Company entered into with United, are the principal subjects of this litigation.

B.

THE CONTRACTUAL RELATIONSHIPS OF THE PARTIES

United is a major New Mexico uranium producer. Much of the uranium it produces is used in the nuclear reactors of public utilities. In the 1960's, United entered into the fuel fabrication market. Fuel fabrication is the process by which enriched uranium is manufactured into fuel clusters to power nuclear reactors.

In 1966, United entered into a contract to sell nuclear fuel to Commonwealth Edison, a commercial utility. It later contracted to sell fuel to I&M, and signed letters of intent to deliver fuel to Detroit Edison, Duke Power, Yankee Atomic and Consolidated Edison, all of which are also commercial utility companies. United also signed a letter of intent with Commonwealth Edison to supply it with additional fuel.[5]

By 1970, United's commercial nuclear fuels business required more capital than United had or could obtain on its own. In that year, United entered into negotia-

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[5] One issue in this case is whether United's so-called letters of intent with the utilities were actually non-binding letters of intent, or rather, binding contracts. We will refer to them here as letters of intent, and discuss the legal nature of them in Section II B, *infra*, of this opinion. However, collectively, the formal contracts and the letters of intent will be referred to as the utility contracts.

tions with Gulf, through Gulf Energy, to form a joint commercial light water reactor fuel fabrication business. For its part, Gulf was interested in such a business as an outlet for its uranium supply and as an opportunity to enter the fuel market for such reactors, which might provide a hedge for its high temperature reactor business.

The negotiations between Gulf and United culminated in July 1971, with the formation of a jointly owned corporation called Gulf United Nuclear Fuels Corporation (Gulf-United). The purpose of Gulf-United was to manufacture and sell nuclear fuel for commercial power reactors. United contributed its expertise in the business and some of its facilities and employees. Gulf was to contribute capital. United assigned its rights under the utility contracts to Gulf-United, thereby obligating the new corporation to supply the utilities with uranium. United in turn agreed to supply the new corporation with the uranium needed to fulfill the utility contracts. This latter agreement will be referred to as the 1971 Supply Agreement. Gulf was to supply Gulf-United with one-half of the uranium required for each existing order and letter of intent, but, upon the advice of United's counsel, this obligation was made an option. Gulf owned fifty-seven percent of the capital stock of Gulf-United, and United owned the remainder.

From 1971 to 1973, Gulf-United was jointly operated by Gulf and United. During this period Gulf-United formalized two of the letters of intent. For reasons that are disputed, Gulf-United's business did not prosper. In the summer of 1973, United agreed to sell its interest in Gulf-United to Gulf (the Buyout Agreement). United and Gulf then entered into a new contract, the 1973 cancelled and rescinded the 1971 Supply Agreement, Supply Agreement. Pursuant to this contract, which United agreed to sell Gulf-United the uranium needed to

supply the utilities. Gulf-United continued to be obligated to supply the utilities with uranium. Thus, the 1973 Supply Agreement basically replaced the 1971 Agreement, with an upward adjustment in the price.

In November 1973, Gulf-United was merged into Gulf. Gulf then entered into a partnership with Scallop. That partnership, known as General Atomic Company (GAC), is the defendant here. Gulf transferred Gulf Energy, including Gulf General Atomic to the new partnership. In the spring of 1974, Gulf transferred the Gulf-United business operation, including the utility contracts and the 1973 Supply Agreement, to GAC. GAC thus became obligated to perform the utility contracts and acquired the right to receive uranium from United. In essence, GAC simply took over the operations of Gulf Energy and Gulf-United.

Later in 1974, the new partnership, GAC, entered into another contract with United, the 1974 Supply Agreement, whereby United became obligated to supply GAC with an additional three million pounds of uranium.

United contends that Gulf entered into the formation of Gulf-United and the 1971 Supply Agreement as part of an attempt to monopolize the uranium market, and with the specific intent of eliminating United as a competitor in the fuel fabrication and uranium mining industries. United contends that Gulf fraudulently promised to supply Gulf-United with capital and one-half of the uranium needed for the utility contracts. United alleges that as part of this monopolistic scheme, Gulf refused to honor its obligations, refused to permit Gulf-United to buy uranium on the open market, and forced United to supply all of the uranium necessary to meet Gulf-United's needs. United argues that by deliberately mismanaging Gulf-United and withholding capital and uranium, Gulf successfully forced United to sell its interest in Gulf-United to Gulf at terms Gulf dictated and to execute the 1973 Supply Agreement. United also

alleges that Gulf, acting through GAC, planned and attempted to negotiate out of its obligations to the utilities, and to then resell the uranium which United was obligated to supply at prices that Gulf had fixed. Knowing that United was in desperate financial straits, Gulf and GAC are alleged to have sought to secure a security interest on United's Churchrock, New Mexico mine—the largest underground uranium mine in the United States —and the right to control production from that mine. GAC allegedly refused to give United any price relief. This impasse led to the filing of this case.

All of the foregoing alleged actions are asserted to have been part of a larger conspiracy to control uranium reserves in the United States. United contends that Gulf sought to accomplish this feat by tying up vast quantities of uranium through the contracts it entered into between 1972 and 1974 with other American uranium producers, in addition to the 1973 and 1974 Supply Agreements with United, and by acquiring, and then delaying the production of, uranium from Gulf's enormous Mt. Taylor reserves.

C.

THE INTERNATIONAL URANIUM CARTEL

Several months after this case was filed, United raised a new allegation—that Gulf's and GAC's monopolistic efforts were part of a worldwide conspiracy of certain international uranium producers to fix the prices, allocate the markets, and control the production of uranium. United's efforts to secure discovery of records relating to this international uranium cartel became the major focus of this litigation, and GAC's failure to supply cartel-related information was the principal basis for the sanctions order and default judgment entered by the trial court.

The precise facts regarding the development and operation of the cartel are not completely clear, largely because full cartel-related discovery was not made in this case. However, several matters are well-established.

First, as GAC concedes, there was a uranium cartel made up of various international uranium producers, which operated from at least 1972 to 1975. Foreign governments, including those of Canada, South Africa, France and Australia, played some role in the formation and operation of the cartel. The nature of the roles played by those governments, particularly by the Canadian Government, is a disputed question in this case, the resolution of which is critical to the disposition of one of the major issues raised by GAC on appeal. We will examine this question in Section II C, *infra*, of this opinion.

Second, it is established that Gulf, acting through Gulf Canada, was a member of the cartel no later than June 1972. It is also clear that the top executives of Gulf Energy, the immediate predecessor of GAC, were aware of the cartel and received information concerning its activities. At least two high-level officials of Gulf Energy attended one or more cartel meetings. All of these executives later became key personnel of GAC.

Third, the basic purpose of the cartel are unquestionably clear. GAC's counsel stated to the trial court:

> The purpose of [the cartel] was to set terms and conditions of sale. It was to set floor prices. And it was to set quotas and divide up who could produce how much. They were going to restrict supply. *It was in its intention a cartel in every sense of the word.* (Emphasis added.)

One of the Gulf attorneys who had advised Gulf that it was legal for it to join the cartel later told a Congressional subcommittee impaneled to investigate cartel ac-

tivities: "There, of course, was never any doubt about what the 'cartel' intended to accomplish. It was to completely frustrate free competition." *International Uranium Cartel: Hearings Before the Subcomm. on Oversight and Investigation of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 1st Sess., Serial No. 95-95, p. 89 (1977) [hereinafter cited as *Hearings on International Uranium Cartel*].

Fourth, between 1972, when the cartel apparently began, and 1975, when this suit was filed, the price of uranium in the United States increased from approximately $6.00 per pound to approximately $40.00 per pound.

Beyond these four established facts—the existence of the cartel, Gulf's active participation therein, the cartel's anti-competitive purposes, and the dramatic increase in uranium prices during the cartel's existence—there is little about the cartel that is not disputed by the parties. One of the principal disputes is whether the cartel has any relevance to the contracts at issue in this litigation, which will be discussed in Section II B, *infra*, of this opinion.

D.

HISTORY OF THE PROCEEDINGS IN THE TRIAL COURT

In Section III A, *infra*, of this opinion we will discuss in detail the chronology of the proceedings in the court below in the context of analyzing GAC's efforts to comply with the court's discovery orders. At this point, however, it is necessary to provide a brief outline of those proceedings in order to facilitate an understanding of the overall posture of the case and the various issues on appeal.

On December 31, 1975, United filed this action in Santa Fe District Court. On the same day, United served lengthy interrogatories on GAC. This set of interroga-

tories will be referred to as the First Set of Interrogatories. The interrogatories called for detailed information concerning the uranium and fuel fabrication businesses of Gulf, Scallop and GAC. Many of the interrogatories specifically asked for information from "the partnership and the partners." Neither the complaint nor the interrogatories specifically mentioned the international uranium cartel.

On April 5, 1976, GAC filed the first of two sets of answers to the First Set of Interrogatories. The answers provided no information on the cartel and virtually no information on the separate uranium business activities of Gulf and Scallop. The trial court eventually found these answers to have been "wholly inadequate and evasive."

During the summer of 1976, extensive discovery efforts were conducted by United. GAC produced its business records, but it did not produce documents which were in the separate possession of Gulf or Scallop. On September 23, 1976, the Canadian Government promulgated the Canadian Uranium Information Security Regulations, which prohibited the release of cartel information from Canada.[6] One week later, United pointed out for the first time that GAC had failed to produce documents from Gulf and Scallop. GAC then contended that it was not obligated to produce records which were in the separate possession of the partners. *See* Section II A, *infra*. The trial court rejected this argument on November 30, 1976. The court held that both the partnership and the partners were subject to its discovery orders, and it warned that sanctions would be imposed if either the partnership or the partners failed to comply with those orders.

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[6] Can. Stat. O. & R. 76-644 (1976). The Regulations were promulgated pursuant to the Canadian Atomic Energy Control Act, 1970, Can. Rev. Stat. c. A-19. Pertinent portions of the original Regulations are set forth in n. 41, *infra*.

United then moved to compel production of partner documents and supplemental answers to the First Set of Interrogatories. GAC continued to assert that partner documents were not discoverable, and the court again rejected this argument at three different hearings in January 1977. It ordered GAC to provide supplemental answers and to produce partner documents by April 15, 1977.

In February 1977, United moved to compel production of cartel-related documents Gulf had produced in other litigation. GAC resisted production of these documents, once again rearguing the question of partner discovery. GAC also suggested for the first time that United's counsel, who had represented Gulf until November 1976 on its operations at Mt. Taylor, might have to be disqualified in this case. *See* Section IV, *infra.* On March 1, 1977, for the first time GAC specifically asserted the Uranium Information Security Regulations as a bar to discovery of cartel information. At a hearing on March 7, the court reiterated its previous rulings that Gulf was subject to its discovery orders, granted United's motion to produce the cartel records, and again warned that sanctions, including a default judgment, would be imposed if good faith discovery efforts were not made. GAC then formally moved to disqualify United's counsel. The court denied this motion. In March 1977, I&M, which had been joined as a party in January 1977, filed claims against GAC, specifically asserting Gulf's cartel activities as a basis for the relief it sought. GAC's supplemental answers were filed on April 15. They made no mention of the cartel.

In August 1977, United filed its Second Set of Interrogatories. This set was specifically addressed to the activities of the cartel. GAC filed objections to these interrogatories. The objections made no mention of the Uranium Information Security Regulations or any other

Canadian secrecy laws. The court overruled most of the objections. GAC then filed answers to these interrogatories, which included the assertion that Canadian laws barred production of cartel documents.

United moved to compel further answers to the interrogatories and the production of cartel documents, and to have sanctions imposed. The trial court granted the request for further answers. The court found that GAC had not acted in good faith regarding the production of cartel documents up to that time. It ordered GAC to produce cartel records to the extent lawful, and to the extent that it was unlawful, to seek a waiver of Canadian nondisclosure laws. The court again warned that sanctions would be imposed if its order was not complied with.

GAC unsuccessfully sought permission from the Canadian Government to produce cartel documents located in Canada. GAC then submitted its second set of answers which did not identify any cartel documents located in Canada or contain information from such documents.

Five days after the trial began, United again moved to compel the production of cartel documents and for sanctions for GAC's alleged discovery failures. At a hearing on November 8, 1977, the trial judge accused GAC of "stonewalling" information. The following day, GAC moved to disqualify the judge. The motion was denied. *See* Section V, *infra*. The trial court, after a hearing, found that GAC had deliberately housed cartel documents in Canada in an attempt "to court legal impediments" to their production. It also found that GAC had violated its prior order to identify cartel documents, and it again ordered such identification.

In December 1977, United and I&M filed objections to GAC's second set of answers to the Second Set of Interrogatories and moved to compel further answers. The trial court granted this request. On February 1, 1978, GAC filed its third set of answers. Thereafter, United

filed its fourth motion for a default judgment, in which I&M joined. The trial court granted the motion, and entered the sanctions order and default judgment which is the subject of this appeal. The trial court found all issues of liability against GAC and in favor of I&M and United. The court found that GAC had acted in bad faith throughout the discovery process, and had "willfully, intentionally and in bad faith covered up" "highly relevant" information concerning the cartel and Gulf's role therein. The court said that GAC's answers to the First Set of Interrogatories were "wholly inadequate and evasive," and that its series of answers to the Second Set of Interrogatories amounted to a willful, intentional, deliberate and bad faith failure and refusal to answer. *See* Section III, *infra.*

A lengthy trial on the question of damages was conducted following entry of the sanctions order and default judgment. *See* Section VI, *infra.* On May 16, 1977, the court entered a final judgment against GAC.

II.

PROPRIETY OF DISCOVERY ORDERS

The first area we examine is whether the trial court's discovery orders, which the court found GAC had willfully failed to comply with, were within the court's authority to enter. If, as GAC contends, the court's orders were invalid from the outset, then GAC could not have been sanctioned for its failure to comply with them.[7]

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[7] "If sanctions are imposed under Rule 37(b), . . . on appeal from the order imposing sanctions the appellate court will consider the propriety of the prior order for discovery." C. Wright and A. Miller, *Federal Practice and Procedure: Civil* § 2289, p. 791 (1970) (footnote omitted). *See also Familias Unidas* v. *Briscoe,* 544 F.2d 182, 191 (5th Cir. 1976); *Gordon* v. *Federal Deposit Insurance Corporation,* 138 U.S. App. D.C. 308, 427 F.2d 578, 581 (D.C. Cir. 1970); *Hanley* v. *James McHugh Construction Company,* 419 F.2d 955, 957 (7th Cir. 1969).

The orders involve the production of documents or the furnishing of information regarding the international uranium cartel. GAC contends that they were invalid for four reasons: (1) information and documents in the possession of the partners cannot be the subject of discovery orders in a case in which only the partnership, and not the individual partners, is a party; (2) the cartel documents and information are not relevant to any issue in this case; (3) adjudication of any issues regarding the cartel, and therefore discovery orders directed at cartel-related information and documents, are barred by the act of state doctrine and the exclusive federal power over the conduct of foreign relations; and (4) the New Mexico Antitrust Act cannot be applied to the 1973 and 1974 uranium supply agreements, and therefore, the court was without jurisdiction to enter discovery orders based on appellees' allegations of violations of that Act. Each of these contentions will be separately discussed in the sections that follow.

A.

Discovery of Partner Documents

GAC contends that a partner, who is not itself a party in a case brought against the partnership, may not be ordered to answer interrogatories under N.M.R. Civ. P. 33, N.M.S.A. 1978, or to produce documents under N.M.R. Civ. P. 34, N.M.S.A. 1978.

This issue arose when United served its First Set of Interrogatories on GAC. The interrogatories clearly called for information from "the partnership or partners." *See* Section III A, *infra*, and n. 80, *infra*. None of these interrogatories was objected to within the time provided by Rule 33.[8] GAC provided only limited infor-

[8] As we discuss in Section III, *infra*, the failure to raise a timely objection to an interrogatory operates as a waiver of any objection a party might have. However, we address GAC's objection to the

mation from the partners in its original answers to those interrogatories. During several months of document production that followed the filing of those answers, it did not produce any records from the partners' files. In September 1976, United brought GAC's failure to provide information from the partners to the attention of the trial court. In November 1976, the court ruled that the right to discovery extends to "a party partnership and the individual partners comprising the partnership, and the agents, servants, employees, directors and officers of a party or partner," and the court warned that sanctions would be imposed "for the failure of the defendant partnership *or either partner thereof* to comply with specific orders of the Court directing discovery." (Emphasis added.)

The court reiterated this ruling on at least five separate occasions in early 1977. It held that the partners "have the same obligation in relationship to discovery as the partnership," because "[t]he partnership is not an entity in and of the cognizable law." The court stated: "GAC has no substantive separate existence in law. It is not a separate legal entity." GAC then argued that even if the court could order production of partnership-related documents in the possession of the partners, it could not require the partners to produce "non-partnership documents." The court rejected this contention on at least two occasions.[9] Finally, in early March 1977, GAC began

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production of partner documents notwithstanding its failure to raise a timely objection both because the trial court did not rely on the principle of waiver and because it is a question that has apparently never before been specifically decided by any court in the United States. Our decision to decide the question on its merits in no way detracts from the significance to the issues discussed in Section III, *infra*, of GAC's failure to comply with the express provisions of Rule 33.

[9] The distinction between partnership and non-partnership documents confuses the relevancy of the information under Rule 26(b) with its availability under Rules 33 and 34. It is one thing to

to produce documents which were in the possession of the partners. A year later the default judgment was entered because GAC failed to produce all of Gulf's cartel records.

GAC's argument is based on the principle that discovery under Rules 33 and 34 is limited to parties to the case. GAC argues that a partnership is a separate legal entity, and as such, only it, the named defendant in this suit, rather than the non-party constituent partners, is subject to discovery under Rules 33 and 34.

We find it unnecessary to consider the extent to which a partnership is a separate legal entity as a matter of substantive partnership law, because we conclude that under Rules 33 and 34 the trial court properly ordered GAC to produce partner documents and furnish information from the partners.

In construing Rules 33 and 34, we must begin with the notion that discovery is designed to "make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *United States* v. *Procter & Gamble*, 356 U.S. 677, 682 (1958) (citation omitted). In light of that policy, Rules 33 and 34 must be liberally construed in order to insure that a litigant's right to discovery is

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say that non-partnership-related documents are not relevant, but quite another to say that they are incapable of being obtained. The trial court repeatedly made this crucial distinction. If the partnership business was conducted as part of a coordinated Gulf effort to monopolize the uranium market, as United contends it was, then various Gulf documents pertaining to production and marketing of uranium might be relevant, even though they did not directly pertain to what was ostensibly the partnership business. To permit the parties to determine what is related to the partnership business is to allow that party to make its own unilateral determination of the scope of discovery, which, of course, it may not do. *See United States* v. *Board of Trade of the City of Chicago, Inc.*, 18 F.R. Serv. 2d 318, 319 (N.D. Ill. 1973).

"broad and flexible." *Davis* v. *Westland Development Company*, 81 N.M. 296, 299-300, 466 P.2d 862, 865-66 (1970). *See also Goldman* v. *Checker Taxi Company*, 325 F.2d 853, 855 (7th Cir. 1963); *In Re Folding Carton Antitrust Litigation*, 76 F.R.D. 420, 423 (N.D. Ill. 1977); *Hart* v. *Wolff*, 489 P.2d 114, 117 (Alaska 1971).

Rule 33 provides that interrogatories may be served only on a party, but it states that the interrogatories must be answered by the party served, or *"if the party served is . . . a partnership, . . .* by any officer *or agent*, who shall furnish such information as is *available to the party.*" (Emphasis added.) In an earlier opinion concerning this litigation, we noted that Gulf is a general agent of the GAC partnership. We stated: "The agency of a partner is the hallmark of that particular form of business or professional association." *United Nuclear Corp.* v. *General Atomic Co.*, *supra*, 90 N.M. at 100, 560 P.2d at 164. *See* § 54-1-9A, N.M.S.A. 1978. If, under Rule 33, Gulf is obliged, as an agent of GAC, to furnish answers to interrogatories directed at the partnership, it would be incongruous to hold that information in the possession of Gulf is not "available" to GAC for the purpose of giving complete and accurate answers to those interrogatories. Indeed, the rule that "all information available to the interrogated party must be supplied . . . includes information possessed by, or within the knowledge of, . . . agents or representatives of the party." *Wycoff* v. *Nichols*, 32 F.R.D. 370, 372 (W.D. Mo. 1963) (citations omitted).

Although Rule 34 requires production of documents in the "possession, custody or control" of a party, and, unlike Rule 33, it does not specifically refer to the discovery obligations of the agents of a partnership, the principle is well-established that Rules 33 and 34 are "equally inclusive in their scope." *Wilson* v. *Volkswagen of America, Inc.*, 561 F.2d 494, 513 (4th Cir. 1977), *cert.*

denied, 434 U.S. 1020 (1978). *See also Davis* v. *Westland Development Company, supra*, 81 N.M. at 299, 466 P.2d at 865.[10]

GAC concedes that the two rules should be similarly construed, but it argues that the focus should be on the concept of "control" under Rule 34, rather than on the phrase "available" in Rule 33. However, the proper focus is not so much on one phrase or on the other, as it is on the purposes underlying each limitation on the scope of discovery under those rules. In each instance, the purposes are relatively apparent and very pragmatic. Each phrase embodies only two limitations. First, a party obviously cannot be required to produce materials which he is incapable of procuring. Second, in general a party should not be required to obtain, collect or turn over materials which the opposing party is equally capable of obtaining on its own. *Konczakowski* v. *Paramount Pictures*, 20 F.R.D. 588, 593 (S.D. N.Y. 1957); *Cinema Amusements* v. *Loew's, Inc.*, 7 F.R.D. 318, 321 (D. Del. 1947).

It is undisputed that neither United nor I&M was capable of procuring on its own the information and documents sought from the partners. Thus, the critical inquiry concerns only the first of the above mentioned principles—whether the party from whom the materials are sought has the practical ability to obtain those materials. Because the inquiry is a pragmatic one, the phrases "available" and "possession, custody or control" should not be subjected to formalistic strictures which ignore the policy of liberal discovery and the practical realities of the particular situation at issue. *See Hart* v. *Wolff*, *supra*, 489 P.2d at 117. Thus, it is immaterial under

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[10] For cases construing the term "control" to be synonymous with the term "available," *see Sol S. Turnoff Drug Dist.* v. *N.V. Nederlandsche C.V.C. Ind.*, 55 F.R.D. 347, 349 (E.D. Pa. 1972); *Erone Corporation* v. *Skouras Theatres Corporation*, 22 F.R.D. 494, 498 (S.D. N.Y. 1958).

Rules 33 and 34 that the party subject to the discovery orders does not own the documents,[11] or that it did not prepare or direct the production of the documents,[12] or that it does not have actual physical possession of them.[13] It is also clear that the mere fact that the documents are in the possession of an individual or entity which is different or separate from that of the named party is not determinative of the question of availability or control.[14]

In light of the fact that partner documents were ultimately produced in this case, there can be little doubt that, as a practical matter, those documents were "available" to GAC.[15] Therefore, they were subject to discovery orders entered under Rules 33 and 34.

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[11] *See Ghandi* v. *Police Department of the City of Detroit*, 23 F.R. Serv. 2d 35 (E.D. Mich. 1977); *United States* v. *National Broadcasting Company, Inc.*, 65 F.R.D. 415, 419-20 (C.D. Cal. 1974), *appeal dismissed*, 421 U.S. 940 (1975); *Advance Labor Serv., Inc.* v. *Hartford Accident & Ind. Co.*, 60 F.R.D. 632, 633-34 (N.D. Ill. 1973).

[12] *See Herbst* v. *Able*, 63 F.R.D. 135, 138 (S.D. N.Y. 1972).

[13] *See e.g., In Re Folding Carton Antitrust Litigation, supra*, 76 F.R.D. at 423; *Buckley* v. *Vidal*, 50 F.R.D. 271, 274 (S.D. N.Y. 1970); *Smith* v. *Maryland Casualty Company*, 42 F.R.D. 587, 589 (E.D. La. 1967); *Schwartz* v. *Travelers Insurance Company*, 17 F.R.D. 330 (S.D. N.Y. 1954); *Tollefsen* v. *Phillips*, 16 F.R.D. 348 (D. Mass. 1954); *Reeves* v. *Pennsylvania R. Co.*, 80 F.Supp. 107, 108-09 (D. Del. 1948); *Williams* v. *Consolidated Investors, Inc.*, 205 Kan. 728, 472 P.2d 248, 252 (1970).

[14] *See e.g., Pennwalt Corp.* v. *Plough, Inc.*, 85 F.R.D. 257, 263 (D. Del. 1979); *Advance Labor Serv., Inc.* v. *Hartford Accident & Ind. Co., supra*, 60 F.R.D. at 633-34; *Sol S. Turnoff Drug Dist.* v. *N.V. Nederlandsche C.V.C. Ind., supra*, 55 F.R.D. at 349; *Erone Corporation* v. *Skouras Theatres Corporation, supra*, 22 F.R.D. at 498 (S.D. N.Y. 1958).

[15] Indeed, in its Reply Brief in this appeal, GAC conceded that Gulf's records were "available" to it. GAC stated:

> *GAC did not contend in the trial court that it would be unable to persuade Gulf to produce its domestic records* if they came

Our holding in this regard is not only supported by the language and underlying purposes of Rules 33 and 34, but also, it is mandated by two practical considerations. The first concerns the nature of a partnership; the second involves the business relationships of the entities involved in this case.

A partnership is composed of and can only act through its constituent partners. As the trial judge pointed out in this case, if the discovery obligations of a partnership do not extend to the individual partners, then the partners could avoid all meaningful discovery by the simple expedient of maintaining the information and documents related to the partnership business in the separately located files of the partners, rather than in the partnership offices. *Cf.* C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2208, p. 616 (1970) ("[A] party cannot immunize a document from inspection by turning it over to a nonparty so long as it remains in the party's control." (Footnote omitted.))

The second practical consideration which compels the conclusion that documents in the separate possession of the partners should be subject to production concerns the nature of Gulf uranium activities and the history of the General Atomic business operation as they relate to the issues raised in this case.

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within a judicial order to produce. Obviously, Gulf had—and continues to have—a very significant interest in this litigation. As one of GAC's constituent partners, it stands to gain or lose immediately from any decision.

. . . .

. . . *GAC did not represent to the trial court that Gulf would refuse to produce its documents if an order directing it to do so were entered.* (Emphasis added.)

However, GAC *had* stated to the trial court that it had "no obligation *or ability* to furnish . . . documents from Gulf Oil Corporation or Scallop Nuclear, Inc., (Emphasis added.)

Although GAC is a partnership rather than a subsidiary of Gulf, it simply took over the business of Gulf Energy including that of Gulf General Atomic. Gulf Energy was planned to be and was operated by Gulf as one part of a coordinated, comprehensive uranium business. Thus, through Gulf Minerals, Gulf Canada and Gulf Energy, Gulf was involved in the production of uranium, the purchase and sale of uranium supplies, the fabrication of uranium fuel and the manufacture of nuclear reactors. Prior to the creation of GAC, these various Gulf divisions or subsidiaries were clearly not operationally divorced from one another.[16]

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[16] The record is replete with evidence of the interconnection of the various aspects of Gulf's uranium business. In addition to other examples discussed elsewhere in this opinion with respect to other issues raised on appeal, are the following examples, which should suffice to illustrate the point made here: When the cartel was formed, Gulf Canada informed Gulf's executives in Pittsburgh and Gulf Energy officials in San Diego. Over the next six months, officials from Gulf Oil in Pittsburgh (O'Hara, Jackson, Ramsey), Gulf Minerals in Denver (Zagnoli, Allen) and Gulf Energy in San Diego (Hunter, Hoffman) were sent to Canada, Europe and Africa for cartel meetings. Gregg of Gulf Energy was transferred to Gulf Canada, but remained in contact with officials of Gulf Energy (Hunter, Fowler) for at least several months. Officials in Gulf Oil, Gulf Minerals and Gulf Energy participated in the decision to transfer Gregg. In March 1972, Hoffman of Gulf Energy briefed the Gulf Minerals board on Gulf Energy's marketing activities. In August 1972, Hunter briefed Gulf Oil executives in New York City. Rolander of Gulf General Atomic, Gulf Energy, and later GAC, also sat on the boards of Gulf Canada and Gulf Minerals and was chairman of the board of Gulf-United. Gulf Minerals had administrative responsibility for Gulf Canada, and Gulf Minerals' uranium marketing function was handled by Gulf General Atomic. Gulf Energy's larger supply contracts were approved by Gulf's Pittsburgh executives. Gulf Energy and Gulf Minerals worked together on plans for the development of Gulf's Mt. Taylor uranium reserves. In March 1973, Hunter stated that Gulf Energy would "work with GMCL [Gulf Canada] . . . to block" a Westinghouse effort to secure uranium from Austraila.

The transformation of Gulf Energy from a Gulf division to a partnership with Scallop changed the form of the business organization, but not the nature of the business it conducted. There was a substantial continnity of identity in the top levels of management.[17] GAC succeeded to the business records of Gulf General Atomic, Gulf Energy and Gulf-United. The evidence does not indicate that when GAC took over Gulf Energy—operating an identical business, in identical offices, with the same records, and with largely the same personnel in essentially unchanged reporting relationships—it suddenly became totally divorced from the uranium activities of the partners comprising it.[18] The flow of informa-

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[17] The president of Gulf Energy, Mr. Rolander, became the president of GAC pursuant to the terms of the partnership agreement. Mr. Gallaway, the executive vice-president of Gulf Energy, Mr. Johnston, Gulf General Atomic's vice-president for marketing, and Mr. Dieter, Gulf Energy's chief legal adviser, all continued to perform the same duties for GAC. Mr. Hunter, who had attended the cartel's May 1972 meeting in Johannesburg as an executive of Gulf Energy, worked in a similar capacity for GAC, as did Mr. Fowler. As executives of GAC, Gallaway and Dieter remained on the payroll of Gulf, not GAC.

Most of these individuals played some role in the formation and operation of Gulf-United and in the acquisition of uranium by Gulf Energy and GAC. (Rolander, Gallaway and Hunter negotiated the formation of Gulf-United and the execution of the 1971 Supply Agreement with United. All three were members of the Gulf-United board.) All of these individuals at one time or another were either involved in or aware of Gulf's participation in the cartel.

Four months after the formation of GAC, Rolander rejoined the Gulf organization in Pittsburgh, where he remained until after this case was filed. Mr. Gregg, the Gulf Energy employee who was transferred to Gulf Canada in Toronto and became a member of the cartel operating committee, returned to the United States in 1974 to work for GAC, where he remained until the month this case was filed.

[18] One of the more extreme examples of the extent to which GAC has sought to differentiate into distinct compartments the

tion and the transfer of key personnel from one entity to another; the past history of close coordination of activities between GAC's predecessor and other Gulf companies; and the continuity of business purpose—all substantially refute any such implication. We fail to see how what was apparently interrelated for purposes of corporate profit became totally separate and distinct when it became the subject of discovery in litigation.

Other decisions involving discovery from distinct, though related, corporations in cases in which only one corporation is named as a party, support our conclusion that the coordinated nature of the business enterprises of separate entities may justify the imposition of discovery obligations on those entities which are not parties to the action.

In *Societe Internationale, Etc.* v. *McGranery*, 111 F.Supp. 435 (D.D.C. 1953), *modified on other grounds sub nom., Societe Internationale, Etc.* v. *Brownell*, 96 U.S. App. D.C. 232, 225 F.2d 532 (D.C. Cir. 1955), *rev'd on other grounds sub nom., Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958), the court ordered production of documents in the possession of a corporation, which, although related to the corporate-plaintiff, was not itself a party. The court said:

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interrelated activities of the various aspects of Gulf's uranium activities is the following: When Hunter and Hoffman flew from Gulf Energy's San Diego headquarters to the cartel meeting in Johannesburg in May 1972, they went, according to GAC, as representatives of Gulf Canada in Canada, and not Gulf Energy, despite the fact that immediately prior to and after their week-long trip they were top officials with Gulf Energy, and despite the fact that they apparently continued to receive cartel information in their San Diego offices for several more months in order to coordinate Gulf's foreign and domestic uranium marketing efforts. The absurdity of GAC's position is highlighted by Hoffman's deposition in the *Westinghouse* litigation, where he testified that he went to Johannesburg "as an advisor to—I don't recall the name of the Canadian company. What was it? GMCL? Was that their initials?"

> Certain it is that the court can pierce the corporate veil to determine the true character of the interests making up its composition. Subtle relationships are necessarily to be contemplated. Through the interlocked web of corporate organization, management and finance there runs the thread of a fundamental identity of individuals in the pattern of control.

111 F.Supp. at 441-42 (citations omitted). *See also In Re Uranium Antitrust Litigation*, 480 F.Supp. 1138, 1153 (N.D. Ill. 1979) ("The formalities separating the two corporations cannot be used as a screen to disguise the coordinated nature of their uranium enterprise").

These two decisions are consistent with our own in recognizing not only the practical managerial connections between the various entities, but also, the identity of financial interest in the outcome of the litigation. As GAC pointed out on this appeal, Gulf has "a very significant interest in this litigation," and "stands to gain or lose immediately from any decision." It should not be very startling then that we demand as the price of possible legal victory full participation in the disclosure of relevant information by those who stand to profit from the ultimate outcome. Therefore, we hold that the trial court properly concluded that documents and information in the separate possession of the partners were subject to production in a suit in which only the partnership was named as a party.[19]

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[19] The fact that Gulf and Scallop were named as parties in the original suit, which United voluntarily dismissed after its removal to federal court (*see n. 2, supra*) is completely immaterial to the question of the propor scope of Rules 33 and 34. The scope of discovery under those rules does not expand or contract depending on whether or not the individual partners once were or now could be named as parties.

B.

Relevancy of the International Uranium Cartel

The trial court found that information concerning the international uranium cartel was "highly relevant to United's antitrust, fraud, and breach of fiduciary duty allegations against GAC. GAC contests this finding, asserting that the cartel, which became the principal focus of discovery, is completely unrelated to the injury allegedly suffered by United. Therefore, GAC urges that its failure to produce documents and other information regarding the cartel could not be the basis for sanctions under N.M.R. Civ. P. 37(b)(2), N.M.S.A. 1978. *See Roberson* v. *Christoferson*, 65 F.R.D. 615, 620 (D. N.D. 1975); Annot., 6 A.L.R.3d 713, § 6 (1966). We analyze this question in light of the scope of discovery as defined by N.M.R. Civ. P. 26(b), N.M.S.A. 1978, the nature of United's and I&M's allegations against GAC, and the light shed on those allegations by the presently available cartel evidence.

1. *The Legal Standard of Relevancy*

Rule 26(b) states, in pertinent part, that a deponent

> may be examined regarding any matter, not privileged, *which is relevant to the subject matter involved in the pending action*, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party. . . . It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears *reasonably calculated to lead to the discovery of admissible evidence.* (Emphasis added.)[20]

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[20] Although Rule 26(b) refers only to depositions, the scope of discovery permitted under Rules 33 (interrogatories) and 34 (production of documents) is defined in terms of the relevancy standard established in Rule 26(b). *See Davis* v. *Westland Development Company, supra*, 81 N.M. at 299-300, 466 P.2d at 865-66.

This language is subject to a broad interpretation. *Fort* v. *Neal*, 79 N.M. 479, 481, 444 P.2d 990, 992 (1968). "Objections based on alleged irrelevancy must, therefore, be viewed in light of the broad and liberal discovery principle consciously built into" the rules of civil procedure. *Independent Productions Corp.* v. *Loew's, Incorporated*, 22 F.R.D. 266, 271 (S.D. N.Y. 1958). "The boundaries defining information relevant to the subject matter involved in an action are necessarily vague, making it practically impossible to formulate a general rule by which they can be drawn." *La Chemise Lacoste* v. *Alligator Company, Inc.*, 60 F.R.D. 164, 170 (D. Del. 1973).[21] Because courts "are not shackled with strict interpretations of relevancy," *Cox* v. *E.I. Du Pont de Nemours and Company*, 38 F.R.D. 396, 398 (D.S.C. 1965), discovery is permitted as to matters that "are or may become relevant"[22] or "might conceivably have a bearing" on the subject matter of the action,[23] or where there is "any possibility" or "some possibility" that the matters inquired into will contain relevant information.[24]

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[21] *See also Mallinckrodt Chemical Works* v. *Goldman, Sachs & Co.*, 58 F.R.D. 348, 353 (S.D. N.Y. 1973); C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2008, at p. 45 (1970); J. Moore, *Federal Practice*, ¶ 26.56[1], at p. 26-131 (2d ed. 1979).

[22] *Payer Hewitt & Company* v. *Bellanca Corporation*, 26 F.R.D. 219, 221 (D. Del. 1960).

[23] *Triangle Mfg. Co.* v. *Paramount Bag Mfg. Co.*, 35 F.R.D. 540, 542 (E.D. N.Y. 1964); *Bloomer* v. *Sirian Lamp Co.*, 4 F.R.D. 167, 169 (D. Del. 1944).

[24] *In Re Wheat Farmers Antitrust Class Action*, 440 F.Supp. 1022, 1025 (D. D.C. 1977); *In Re Folding Carton Antitrust Litigation, supra*, 76 F.R.D. at 431 (N.D. Ill. 1977); *Detweiler Bros., Inc.* v. *John Graham & Co.*, 412 F.Supp. 416, 422 (E.D. Wash. 1976); *Nichols* v. *Philadelphia Tribune Company*, 22 F.R.D. 89, 90 (E.D. Pa. 1958); C. Wright, *Law of Federal Courts* § 81, at p. 403, n. 47 (3d ed. 1976).

Conversely, courts have said that discovery will be permitted unless the matters inquired into can have "no possible bearing upon,"[25] or are "clearly irrelevant" to the subject matter of the action.[26] Not only is the term "relevant" subject to a broad interpretation as it is generally used in the discovery context, but also, it is given a particularly liberal interpretation for purposes of discovery in antitrust cases.[27]

2. *Summary of Evidence on the Gulf Uranium Business and the Cartel*

The allegations of appellees give great weight to the claim that the cartel is relevant to the subject matter of this litigation. As amended, United's complaint named a number of distinct legal bases for the relief it sought—the invalidation of the 1973 and 1974 Supply Agreements. The complaint alleged that (1) in violation of their fiduciary duties, Gulf and GAC withheld material facts which, if disclosed, would have had a bearing on United's decision to enter into Gulf-United and the 1971,

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[25] *E.I. duPont de Nemours* v. *Deering Milliken Res.*, 72 F.R.D. 440, 443 (D. Del. 1976); *Marshall* v. *Electric Hose and Rubber Company*, 68 F.R.D. 287, 295 (D. Del. 1975); *La Chemise Lacoste* v. *Alligator Company, Inc., supra*, 60 F.R.D. at 171; *Dart Industries, Inc.* v. *Liquid Nitrogen Proc. Corp. of Cal.*, 50 F.R.D. 286, 292 (D. Del. 1970).

[26] *Bailey* v. *Meister Brau, Inc.*, 55 F.R.D. 211, 214 (N.D. Ill. 1972); *Independent Productions Corp.* v. *Loew's, Incorporated, supra*, 22 F.R.D. at 271; *Steamship Co. of 1949* v. *China Union Lines, Hong Kong*, 123 F.Supp. 802, 805 (S.D. N.Y. 1954); *Bloomer* v. *Sirian Lamp Co., supra*, 4 F.R.D. at 169.

[27] *Cf. United States* v. *International Business Machines, Corp.*, 66 F.R.D. 186, 189 (S.D. N.Y. 1974) ("discovery in antitrust litigation is most broadly permitted"). *See also Bass* v. *Gulf Oil Corporation*, 304 F.Supp. 1041, 1046-47 (S.D. Miss. 1969); *Alexander's Department Stores, Inc.* v. *E.J. Korvette, Inc.*, 198 F.Supp. 28, 29 (S.D. N.Y. 1961); *Leonia Amusement Corporation* v. *Loew's, Incorporated*, 16 F.R.D. 583, 584 (S.D. N.Y. 1954).

1973 and 1974 Supply Agreements; (2) the 1971, 1973 and 1974 Agreements were illegal and void because they had been procured through Gulf's and GAC's fraud; (3) Gulf mismanaged Gulf-United, refused to provide Gulf-United with uranium and capital, and economically coerced United into a position where it had no viable alternative to accepting Gulf's requirement of the 1973 Supply Agreement; (4) Gulf tried to eliminate United as a competitor in the nuclear fuels industry and to restrict its ability to compete in the uranium business; (5) the sudden increase in the cost of producing uranium, unforeseen to all but GAC and Gulf, rendered United's performance under the 1973 and 1974 Agreements commercially impracticable; and (6) the 1971, 1973 and 1974 Supply Agreements were void because they were in violation of New Mexico's antitrust laws prohibiting price-fixing attempts and conspiracies to monopolize, and actual monopolization of trade and commerce.

I&M's counterclaim specifically alleged that by their participation in the cartel, GAC and Gulf had violated the New Mexico Antitrust Act, thereby injuring I&M. I&M also defended against GAC's claim that performance of its obligation to supply I&M with uranium had been rendered commercially impracticable by contending that the cartel was responsible for increases in the price of uranium, and therefore, such price increases were not unforeseen by GAC and Gulf.

The evidence which has been produced in this case demonstrates that information on the cartel could be crucial to the proper resolution of this litigation. The following review of some of that evidence should not be considered to reflect a view as to the merits of appellees' substantive claims, but rather, as support for their contention that the cartel is relevant to those claims.

In 1967, Gulf entered the uranium market by purchasing the General Atomic business. Over the next five years, Gulf purchased and began to develop various

uranium ore bearing properties in the United States and Canada, including the large Mt. Taylor reserves in New Mexico. Thus, by the early 1970s Gulf was in a position to be a leading producer of uranium, nuclear fuel fabricator, and manufacturer of nuclear reactors. *See* Section I A, *supra*. It was therefore directly in competition with United.

However, in 1971 Gulf and United formed the jointly owned company, Gulf-United, to fabricate fuel for commercial nuclear reactors, and executed the 1971 Supply Agreement. Independently of Gulf-United, Gulf also began to purchase large quantities of uranium from other American producers.

Contemporaneously with these activities, Gulf began to participate in early meetings of the cartel. Top officials of Gulf Energy (Rolander, Gallaway, Gregg, Hunter and Hoffman) were informed of the cartel's creation and Gulf's participation. Hunter, Gallaway and Rolander were the Gulf officials who negotiated the formation of Gulf-United and the execution of the 1971 Supply Agreement with United. All of these individuals later held key positions in GAC. *See* Section II A, *supra*, especially n. 16 and 17, *supra*. All but Gregg served on the Gulf-United board.

One document reflects that Hoffman, along with Zagnoli of Gulf Minerals in Denver, was participating in cartel discussions in Canada as early as February 1972. The same month Hunter informed Hoffman that Gulf Energy would "proceed to tie up" an additional ten million pounds of uranium. Within weeks, Gulf Energy signed agreements with two American producers to purchase in excess of that amount of uranium. In March, according to Hunter's account, Hoffman informed the board of directors of Gulf Minerals: "We've taken low cost supplies now on market. . . . We've cleaned out cheap material available now." Another document dated in the

spring of 1972, which reviewed Gulf-United's financial condition, stated that Gulf's objective was to "minimize UNC's [United's] book income."

Throughout the spring of 1972, various Gulf officials from the United States attended meetings of the cartel. In late May, Hoffman and Hunter from Gulf Energy, Allen from Gulf Minerals, and Ediger from Gulf Canada, flew to Johannesburg, South Africa for a meeting of the cartel. The available cartel evidence shows that in Johannesburg, the cartelists adopted a set of rules to govern their organization. The rules allocated markets among the participating nations, set minimum prices for uranium, and established a rigged bidding system with a lead bidder and a runner-up bidder. Under a heading labeled "Attitude Towards Competitors," the Rules stated:

> It was argeed that if a supplier not associated with the organization should quote under the minimum price, the leader will not match that quotation and the [cartel's] Operating Committee will review the situation and decide on a course of action as soon as possible.

The Rules also provided that all quotations to fuel fabricators and nuclear reactor manufacturers "should be made on the basis of the minimum prices."

Although the Johannesburg Rules provided for the exclusion of the United States domestic uranium market, one week after the Johannesburg meeting, Hunter, in referring to "the agreements which we have reached in the last couple of days with respect to action which we will be taking," told Hoffman that Gulf's "overall strategy must reflect the interrelationship existing between foreign and domestic markets." He went on to say that "foreign and domestic marketing activities are inseparable and indeed should be treated integrally if we are to optimize the company position." In the following para-

graph, Hunter stated: "Based on input provided by Gulf Minerals, we conclude that corporation profit is greater if New Mexican production begins in 1978 rather than 1976." Hunter then noted that "[i]n order for us to realistically appraise our U_3O_8 competitive position as well as to effectively sell foreign uranium, it is necessary for us to sell uranium directly to the U.S. utilities."

The minutes of a September 5, 1972 cartel meeting indicate that the cartel was considering the prospect of taking anticompetitive actions against the foreign uranium operations of American corporations. The minutes reported:

> There followed a general discussion of the impact of Westinghouse bidding in Europe. . . . Some members thought that Westinghouse should be approached directly, whereas other views were that it would be a dangerous move. *The consensus finally reached was that if the club was to survive as a viable entity, it would be necessary to delineate where the competition was and the nature of its strength, as a preclude to eliminating it once and for all.* (Emphasis added.)

In September 1972, a Gulf attorney observed that "it is improbable that either the cartel structure or operation will remain static," and warned that "the instinctive reaction of the cartel's Operating Committee will likely be to exert pressure to suppress the new competition one way or another." He said:

> It could well be that the governments involved would tacitly approve (or effectively direct) predatory actions by the cartel producer members *to suppress outside competition from any source.* . . . (Emphasis added.)

In March 1973, Hunter, of Gulf Energy, reported that Westinghouse was trying to buy uranium to cover its

"substantial foreign shortage." Hunter stated that if successful, the purchase "would provide Westinghouse with a potential source for U.S. reactor sales." He said that Gulf Energy would "work with GMCL [Gulf Canada] to try to put pressure on the Australians to block the proposed arrangement." [28]

Gregg, the Gulf Energy employee who became Gulf's representative on the cartel's Operating Committee, testified in a deposition taken in the *Westinghouse* uranium litigation that

> Westinghouse was not necessarily singled out for discussion each and every time. There were others who were discussed from time to time, also; GE [General Electric], KWU in Germany, ASEA in Sweden; other reactor manufacturers, Exxon as a fuel fabricator, *Gulf-United as a fuel fabricator*, so perhaps Westinghouse was discussed more than any of the others. (Emphasis added.) [29]

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[28] Both Westinghouse and General Electric were major manufacturers in the United States of nuclear reactors; as such they were competitors of Gulf Energy.

[29] In his deposition in this case, Gregg first testified that United and Gulf-United were never discussed at any cartel meetings. He later qualified that answer by stating that he could not recall those companies being discussed at meetings at which he was present. When specifically questioned regarding the foregoing passage from his *Westinghouse* deposition, Gregg conceded that he had made the statement, but he said he could not recall "who or who was not discussed other than Westinghouse." He stated that Gulf-United and General Electric were "representative of who might have been discussed"; but he could not remember whether or not Gulf-United was ever discussed.

Hunter testified in his deposition in this case that Gulf-United was discussed by Gulf officials at the cartel meeting he attended in Johannesburg in 1972. He stated:

> I raised the point that from my standpoint and understanding in what we were trying to do in the uranium supply, the

Beginning in early 1973, United and Gulf entered into negotiations concerning the disposition of Gulf-United. On January 23, 1973, Mr. Henry, the executive vice-president of Gulf Oil in Pittsburgh, informed the president of United:

> It is our intention that any sale of the shares of Gulf [in Gulf-United], of course, will be done entirely in good faith, on a fair basis, and free of any secret or undisclosed arrangements.

GAC alleges that United had independent knowledge of the cartel, but it does not contend that in the negotiations that followed, Gulf informed United of its role in the cartel.

In June 1973, Gulf executed the 1973 Supply Agreement with United; and in September it bought United's interest in Gulf-United. In November 1973, the GAC partnership was formed, and along with the operations of Gulf Energy, the Gulf-United business was transferred to GAC.

Within nine months of the execution of the 1973 Supply Agreement and the buyout of United's interest in Gulf-United, Gulf also purchased several million pounds of uranium from two other American producers. During the same period, it signed definitive contracts with two utilities to formalize the letters of intent United had previously signed and assigned to Gulf-United.

> [cartel's] middleman restriction would affect our ability to buy uranium to serve Gulf-United and HTGR [high temperature gas cooled reactors].

He went on to say that by virtue of the cartel's rules, Gulf-United "would have to pay the same higher price that . . . Westinghouse would have to pay." But he said that this matter "wasn't of concern" to the other Gulf participants.

By March 1974, Mr. Fowler, a GAC employee reported:

> What appears to be happening is that the international producers are in effect setting the world price via
>
> a) establishing a "floor" that is higher than the U.S. authors to buy.
>
> b) the U.S. producers refuse to sell at any price that doesn't give them a substantial margin above the "floor" being quoted by the non-U.S. producers.
>
> c) Thus, in essence, the international producers can stop any transactions by constantly nudging the floor upward.
>
> In the interim, the U.S. buyer becomes increasingly frustrated, offers a higher price in order to get some response and the cycle starts over again.
>
> It seems likely that at some point, the mechanism will break down and if it does, there will again be price competition. However, it doesn't appear likely the break will come in the immediate future.

Three months later, GAC signed the 1974 Supply Agreement, committing United to supply an additional three million pounds of uranium.

We accept none of the available cartel evidence as conclusive. However, where business records such as these are produced from the files of GAC and Gulf, and where it is undisputed that a uranium cartel existed and that Gulf was a member of it, we are satisfied that cartel information is relevant to the subject matter of this litigation in general, and to the specific allegations of the parties. We look with a jaundiced eye upon any claim of irrelevancy made in the background of (1) the common identity of the individuals who negotiated the contracts at issue here and the formation of Gulf-United;

who participated in meetings of the cartel on behalf of Gulf or were privy to cartel information; and who later formed the top level of management of GAC; (2) the temporal proximity of cartel activities to the purchase by Gulf and GAC of substantial quantities of uranium from several major American producers—including the 1971, 1973 and 1974 Supply Agreements with United; to the formation, the buyout and the dissolution of Gulf-United; and to the creation of GAC; and (3) references to "cleaning out" and "tying up" "cheap material"; to objectives of "minimizing UNC's [United's] book income"; to the "inseparability of domestic and foreign uranium marketing"; to Gulf's need to sell uranium "directly to the U.S. utilities"; to working with Gulf Canada to "block" a Westinghouse uranium purchase; to the likely need to suppress new competition "one way or another"; and most striking of all, to "the consensus," reached by the cartel in the context of discussing an American corporation, "to delineate where the competition was and the nature of its strength as a prelude to eliminating it once and for all." These things are not the stuff of which antitrust irrelevancy is made.

Finally, we cannot accept GAC's argument that the cartel is irrelevant to the commercial impracticability issues in this case.[80] We cannot say that such evidence has

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[80] GAC asserts that United's commercial impracticability claim is a "patent make-weight" because United's forty page trial brief on the subject contained only six sentences concerning the cartel. Relevancy for purposes of discovery is not measured by such a sentence-to-page ratio. As to I&M's defense to GAC's claim of commercial impracticability, GAC's counsel told the trial court at a hearing on August 26, 1977:

> We can understand the people like Indiana-Michigan or Detroit-Edison feeling some sort of misery caused by the present prices of uranium, and we suspect that they will be

no possible bearing on United's claim that the cartel itself was responsible for the enormous price increases in uranium that took place contemporaneously with the operation of the cartel. If the cartel is relevant to that claim, it is no less relevant to I&M's defense that GAC is in no position to claim commercial impracticability because, along with Gulf and the other cartelists, it was responsible for, and thus foresaw, those price increases.

4. *GAC's Arguments as to the Cartel's Irrelevance*

GAC argues that the cartel was irrelevant because United "has been unable to adduce any evidence whatsoever that the 1973 and 1974 contracts were in any way connected with the activities of the cartel." Obviously this proposition is untenable. United sought cartel evidence in order to establish that the 1973 and 1974 Supply Agreements were connected to cartel activities in one manner or another. It makes no sense whatsoever to say that the cartel is not relevant, and therefore cartel information will not be produced, because the plaintiff who seeks such discovery has failed to produce, from what has been withheld from it, evidence to conclusively establish its case. As the court said in *Beler* v. *Savarona Ship Corporation*, 26 F.Supp. 599 (E.D. N.Y. 1939):

> The requirement of materiality does not . . . compel the person seeking discovery definitely to prove materiality before being entitled to a discovery. Such an interpretation of the rule would place upon it a

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completely unable to establish anything to do with the cartel leading to the existence of the price levels. . . .

Obviously, the cartel is not made irrelevant to I&M's claims simply because GAC's counsel "suspects" that those claims would ultimately not be proved. *Cf. American Mfrs. M.I. Co.* v. *American Broadcasting—Para. Th.*, 388 F.2d 272, 279, n. 9 (2nd Cir. 1967) (" '[T]hat it might be surmised that the adverse party is unlikely to prevail at the trial is not sufficient to authorize summary judgment against him' ") (citation omitted).

narrow construction which would severely limit the bounds of the discovery procedure. It might compel a party to know what was in the documents before he had seen them. One of the basic purposes of the new Rules is to enable a full disclosure of the facts so that justice might not move blindly.

See also Radio Corporation of America v. *Rauland Corporation*, 18 F.R.D. 440, 444-45 (N.D. Ill. 1955).

GAC further argues that the cartel cannot conceivably be relevant because by May 1971, United had "locked up" the uranium covered by the 1973 Supply Agreement through supply contracts it had directly entered into with the utilities; and second, that the cartel came into existence in 1972. Because United allegedly had committed the uranium previous to the formation of the cartel, GAC concludes that cartel activities could not possibly have been the cause of any competitive injury United might have suffered.

There are a number of reasons why this argument must be rejected. In the first place, there is a dispute in this case over the question of whether the uranium covered by the 1973 Supply Agreement was in fact "locked up" prior to the formation of the cartel, or even prior to the execution of the 1971 Supply Agreement. Over one-half of the uranium at issue here involves the utility agreements with Detroit Edison and Duke Power. Originally, this uranium was covered by letters of intent United signed with the utilities in 1969 and 1970, respectively. United's contention that these were merely non-binding agreements finds some support in the record.[31] But even if we were to assume that they were

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[31] The Detroit Edison letter of intent, which is dated September 25, 1969, reads in part:

> Please be advised that The Detroit Edison Company has determined and *intends to enter into a contract* with the

binding contracts at the time of the formation of Gulf-United in 1971, and that the cartel was not formed prior to 1972, it would not necessarily follow that cartel evidence has no bearing on the issues in this case.

United contends that Gulf did not disclose a slippage in the construction of a Commonwealth Edison reactor which allegedly would have waived Gulf-United's obligation to supply the utility with fuel, and that Gulf signed a secret "side-letter" with Duke waiving conditions which also allegedly would have denied Duke uranium. These actions were allegedly taken in order that GAC could resell the uranium covered by the 1971 and 1973 Supply Agreements at higher prices. Other allegations which would have a bearing on the case, even if the uranium had all been previously committed by United, are that Gulf wrongfully refused to supply Gulf-United with the uranium needed to fulfill the requirements of the utility contracts, wrongfully blocked Gulf-United's efforts to purchase uranium on the open market, and wrongfully interfered with United's efforts to independently ne-

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United Nuclear Corporation for the nuclear materials, fabrication, and services therein defined.

United Nuclear Corporation and Detroit Edison *will proceed reasonably toward the negotiation, drafting, and execution of a formal written contract* which will reflect the pertinent rights and obligations of each party *as generally set forth* in the referenced documents *and as discussed and to be discussed* during the various meetings of representatives of our two companies. *It is also subject to the receipt of all necessary approvals of regulatory authorities.* (Emphasis added.)

Formal definitive contracts were signed on the basis of this letter of intent and a letter of intent of December 30, 1970 with Duke Power, on March 19, 1973 by Gulf-United, and on November 7, 1973 by Gulf, respectively. United signed two additional letters of intent with Yankee Atomic and Consolidated Edison. The latter two letters were also assigned to Gulf-United in 1971, but formal contracts were never signed, and the uranium covered by these letters is not included in the 1973 Supply Agreement.

goitate directly with the utilities for price relief and other conditions of sale. Cartel information is relevant to United's claim that Gulf tied up the cheap material on the market, thus denying United alternative sources of uranium to fulfill its commitments to Gulf-United and driving up uranium prices. United argues that the price increases encouraged new exploration and mining which increased the competition for limited mining supplies and labor, and in turn caused United to incur far greater uranium production costs than it otherwise would have.

We also consider it material to GAC's relevancy argument that Gulf apparently considered it necessary "to sell uranium directly to the U.S. utilities" in order to maintain its competitive position; and that GAC now contends that although it is not obligated to supply uranium to I&M or the other utilities,[32] United nonetheless remains obligated to supply GAC with at least a substantial portion of the uranium covered by the 1973 Supply Agreement.

Finally, even were GAC's position sound as to United's allegations of fraud, breach of fiduciary duty, economic coercion and antitrust violations concerning the 1973 Supply Agreement, it would have no bearing on United's allegations concerning the 1974 Supply Agreement, or on United's and I&M's claims based on commercial impracticability. As to the former, GAC contends that it involved a blind transaction, and since it therefore did not know the seller, neither GAC nor Gulf could have entered into that agreement with illicit intentions towards United. However, that fact does not alone dispose of United's claims, for even such a blind agreement could conceivably have been a part of a scheme to achieve

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[32] Notes of a GAC-Gulf litigation strategy meeting held on January 13, 1976 in San Diego, which were inadvertently produced to United in this case, reflect a GAC "plan to welch on *all* utility contracts." (Emphasis in original.)

monopoly control over United States uranium reserves. As to the commercial impracticability questions, we have previously noted that even GAC does not advance a persuasive argument of irrelevancy. *See* n. 30, *supra*.

GAC vehemently contests the merits of each of the foregoing allegations, contending that all are unsubstantiated.[33] But in the discovery context, it is not the function of the trial court or of this Court to try every issue prior to the full disclosure of all relevant information.[34] Nor is it

> the function of . . . counsel to rule with finality on the relevancy or irrelevancy of documents in their exclusive possession and thereby to deprive both Court and opposing counsel of an opportunity to evaluate their contentions.

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[33] GAC's arguments are contained in a forty-six page appendix entitled "Review of Historical Facts." This appendix was filed along with GAC's reply brief. It apparently was not included in that brief because GAC had already met the 150 page limit on that brief this Court had specifically set at GAC's request. We note that GAC did not seek leave of the Court to exceed that page limitation in order to include these additional arguments in its reply brief, nor did it seek or receive permission from the Court to file such an argument in an appendix, rather than in a brief. "[W]e disapprove of and will in the future disregard attempts by counsel to supplement their briefs in a manner not authorized by the rules." *Lance* v. *New Mexico Military Institute*, 70 N.M. 158, 164, 371 P.2d 995, 999 (1962).

[34] "Ordinarily, in ruling on a discovery motion, the Court will not determine whether a claim in the complaint, if proved, would have a bearing on the ultimate outcome of the action, it being sufficient that the matter to be explored is relevant to the issues made by the pleading." *Apel* v. *Murphy*, 70 F.R.D. 651, 654 (D. R.I. 1976) (citation omitted). *See also Humphreys Exterminating Company, Inc.* v. *Poulter*, 62 F.R.D. 392, 393 (D. Md. 1974); *V.D. Anderson Co.* v. *Helena Cotton Oil Co.*, 117 F.Supp. 932, 945, n. 9 (E.D. Ark. 1953).

Radio Corporation of America v. *Rauland Corporation*, *supra*, 18 F.R.D. at 444. The rules call for something quite different:

> Unless it is palpable that the evidence sought can have no possible bearing upon the issues, the spirit of the new rules calls for every relevant fact, however, remote, to be brought out for the inspection not only of the opposing party but for the benefit of the court which in due course can eliminate those facts which are not to be considered in determining the ultimate issues.

Hercules Powder Co. v. *Rohm & Haas Co.*, 3 F.R.D. 302, 304 (D. Del. 1943). *See also La Chemise Lacoste* v. *Alligator Company, Inc.*, *supra*, 60 F.R.D. at 171.

At the present stage of the litigation, we are unable to say that information concerning an international uranium cartel, which had as its avowed purpose the fixing of prices for and the allocation of markets in uranium, and which counted a constituent partner of GAC as one of its members, palpably can have no possible bearing upon the subject matter of this action. Therefore, cartel information satisfies the test of relevancy for purposes of discovery under Rule 26(b).

C.

Act of State Doctrine and Exclusive Federal Power Over Foreign Relations

GAC's second basis for challenging the validity of the trial court's discovery orders involves two distinct legal principles—the act of state doctrine and the exclusive power of the federal government over the conduct of foreign relations. Although distinct, each principle is alleged to be applicable to this case because of two actions of the Canadian Government—first, the role that Government played in the foreign uranium cartel; and

second, the Canadian Uranium Information Security Regulations. GAC contends that both principles, as applied to these actions of Canada, precluded the trial court from considering any claims concerning the cartel or Gulf's role therein and, therefore, from entering discovery orders directed at cartel documents or information. The applicability of each of these principles will be separately examined.

1. *The Cartel and the Act of State Doctrine*

The classic definition of the act of state doctrine is found in *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897):

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.

The act of state doctrine, which has "'constitutional' underpinnings," reflects "the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423, 427-28 (1964). The doctrine "derives from the judiciary's concern for its possible interference with the conduct of foreign affairs by the political branches of the government." *Timberlane Lbr. Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597, 605 (9th Cir. 1976). The doctrine is a matter of federal law which is binding on state courts. *Banco Nacional de Cuba* v. *Sabbatino*, *supra*, 376 U.S. at 427; *Republic of Iraq* v. *First National City Bank*, 353 F.2d 47, 50-51 (2nd Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966).

GAC contends that the act of state doctrine is applicable because the Canadian Government participated in

the cartel and effectively compelled Gulf, through its Canadian subsidiary, Gulf Canada, to join the cartel, transforming the cartel itself and all actions Gulf or Gulf Canada may have taken pursuant to it into the acts of a foreign state.[35] GAC asserts that judicial inquiry into the cartel and Gulf's role therein is precluded by the act of state doctrine because such an inquiry would necessarily place in question the legitimacy of the Canadian Government's actions.

The Canadian Government has repeatedly stated that it "initiated" the discussions which led to the formation of the cartel, and that it thereafter "participated" in that organization. It has also stated that it "approved" of the participation of Canadian uranium producers in the cartel and that Gulf participated at the Government's "specific written request." [36]

We accept these representations of the Canadian Government. However, the initiation of the cartel and the participation therein by that Government are not sufficient alone to transform the cartel-related activities of a wholly-owned subsidiary of a corporation based in the United States into the sovereign acts of a foreign nation, and thus to immunize those activities from challenge in American courts.

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[35] In the findings it entered as sanctions against GAC for GAC's failure to comply with its discovery orders, the trial court found that the cartel was made up of uranium producers. Although the court did not mention government participation in the cartel, it did find that the Canadian Government had "encouraged," but neither "required," "mandated," nor "compelled" Gulf or Gulf Canada to participate in the cartel.

[36] According to that Government, the cartel was created in order to protect the uranium mining industries of the participating nations from the adverse consequences of an embargo the United States Government had established in 1964 on the importation of foreign uranium into this country. *See* Act of August 26, 1964, P.L. 88-489, 78 Stat. 602.

It is well-settled that the mere fact that a foreign government approved, authorized, tolerated, encouraged, aided, or participated in the anti-competitive actions of a private individual or corporation does not necessarily provide an act of state defense. *See Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 592-93 (1976);[37] *Continental Co.* v. *Union Carbide*, 370 U.S. 690, 706-07 (1962); *U.S.* v. *Sisal Sales Corp.*, 274 U.S. 268, 276 (1927); *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1293 (3rd Cir. 1979); *Timberlane Lbr. Co.* v. *Bank of America N.T. & S.A.*, *supra*, 549 F.2d at 606; *Linseman* v. *World Hockey Ass'n*, *supra*, 439 F.Supp. at 1324; *United States* v. *The Watchmakers of Switzerland Information Center, Inc.*, 1963 Trade Cas. ¶ 70,600 (S.D. N.Y. 1963), *order modified*, 1965 Trade Cas. ¶ 70,352 (S.D. N.Y. 1965); Annot., 40 A.L.R. Fed. 343, 379-80, § 15 (1978); Baker, "Antitrust Conflicts Between Friends: Canada and the United States in the Mid-1970's," 11 Cornell Int'l L. J. 165, 177-78 (1978). In the recent case of *Industrial Inv. Development* v. *Mitsui & Co., Ltd.*, 594 F.2d 48 (5th Cir. 1979), *cert. denied*, 100 S.Ct. 1078 (1980), the court said that "the instigation of foreign governmental involvement does not mechanically protect conduct otherwise illegal in this country from scrutiny by the American courts." *Id.* at 52.

It is not sufficient merely to say the Government of Canada played a role in the cartel. The critical inquiry is into the nature of the role played by the foreign government, for "the very assertion of an act of state defense requires the court to examine into the nature of the conduct complained of and its relationship to the foreign

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[37] Although this case dealt with the doctrine as it applies to an act of one of the states of the United States, the Court's ruling in *Cantor* applies to acts of foreign governments as well. *See Hunt* v. *Mobil Oil Corp.*, 550 F.2d 68, 80 (2nd Cir. 1977) (Van Graafeiland, J., dissenting), *cert. denied*, 434 U.S. 984 (1977); *Linseman* v. *World Hockey Ass'n*, 439 F.Supp. 1315, 1324 (D. Conn. 1977).

sovereign." *Hunt* v. *Mobil Oil Corp., supra,* 550 F.2d at 79 (citations omitted) (Van Graafeiland, J., dissenting). Unless a court can examine this initial issue—"whether the acts complained of are in reality the acts of the defendants or the acts of a foreign government" [38]—it cannot determine whether the act of state doctrine applies, for that doctrine requires the act in question to be "the public act of those with authority to exercise sovereign powers." *Alfred Dunhill of London, Inc.* v. *Cuba,* 425 U.S. 682, 694 (1976).

In each of the act of state decisions cited above, there appeared to be little doubt as to the nature of the role played by the foreign government. However, in this case, the absence of cartel discovery has made it impossible for our courts to determine the preliminary question—whether the *challenged* acts involve *any* action by the Government of Canada. There are two aspects to this dilemma.

First, neither the official statements of the Canadian Government nor the available cartel evidence fully describes the acts of the cartel or the situs of those acts. More specifically, without the cartel records, it is impossible to determine precisely what cartel-inspired actions Gulf Canada, Gulf or GAC may have taken, at whom such actions may have been directed, or where they occurred.

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[38] W. Fugate, *Foreign Commerce and the Antitrust Laws* 49-50 (1958). *See also* Fugate, "Antitrust Jurisdiction and Foreign Sovereignty," 49 Va. L. Rev. 925, 932 (1963):

> The real question is *whose* acts are the subject of inquiry. If the acts are those of the foreign government within its own jurisdiction, then the antitrust exception applies. The situation is the same if the foreign government through its laws, regulations, or orders, *requires* private parties to perform the anticompetitive acts. If, on the other hand, the acts complained of are in reality those of private parties who seek to hide behind the cloak of foreign law, the courts will attach antitrust liability.

Second, the absence of cartel information has made it impossible to fully delineate the precise role played by the Government of Canada in the cartel; and more importantly, what specific actions, if any, Gulf was "compelled" by that Government to perform, or where those activities took place.

Without this vital information we cannot determine if the act of state doctrine is applicable, as the following hypotheticals demonstrate. First, if we assume that the cartel, as the Canadian Government has described it, was not intended to, and did not have an adverse impact on, the domestic market of the United States, then cartel activities might well be beyond the scope of American antitrust laws,[39] and shielded by the act of state doctrine.

However, we could also assume—because the absence of cartel records makes it impossible to negate the possibility—that Gulf, with the knowledge of such anti-competitive, non-United States activities and of the potential business opportunities such activities presented, went beyond the scope of the cartel as the Canadian Government defined it, and took predatory actions in the United States designed to eliminate competitors and to monopolize uranium reserves.[40] If this were the case, GAC and Gulf

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[39] "Sherman Act jurisdiction now depends upon a showing of anticompetitive effects within the United States." *Industrial Inv. Development* v. *Mitsui & Company, Ltd., supra,* 594 F.2d at 52 (citations omitted). *See also* K. Brewster, Jr., *Antitrust and American Business Abroad* 65-75 (1958); W. Fugate, *supra* at 29-34.

[40] GAC itself made this very distinction to the court below. In its opening statement at the trial, GAC's counsel stated:

> [T]he 1973 and 1974 supply agreements were not the part, product, or in any way connected with an agreement of the cartel.
>
> *Now, it may be that Gulf was motivated to go into the agreements because of the cartel, or its knowledge of the cartel.* There may be a lot of things. And all of those "maybes" may come out at trial. (Emphasis added.)

would not be shielded by the act of state doctrine, since the Canadian Government would have played no role in the *Specific* anti-competitive conduct challenged in our courts. *See Continental Co.* v. *Union Carbide*, *supra*, 370 U.S. at 706-07; W. Fugate, *supra*, at 148.

The Canadian Government has repeatedly stated that the United States was excluded from the cartel's operations. However, Prime Minister Trudeau stated in October 1977 that although the exclusion of the domestic markets of the United States and Canada was his government's policy, he did not rule out the possibility that some producers may have gone beyond that policy. He stated: "We have no knowledge what some companies may have done under the pretext or cover of government policy." *Official Report of House of Commons Debates*, Vol. 121, No. 6, p. 224, 3rd Sess., 30th Parliament (Oct. 25, 1977).

Without the withheld cartel documents it is impossible to determine whether the limited territorial scope of that policy was adhered to by the cartel or by Gulf. Although the Canadian Government has said that the cartel did not include the United States market, the broad proscriptions of the Canadian Uranium Information Security Regulations are not similarly limited. The language of those Regulations is broad enough to encompass *any* documents or information concerning the uranium activities of an American corporation in the United States.[41] Thus, the

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[41] The Regulations read in pertinent part:

> No person who has in his possession or under his control any note, document or other written or printed material in any way related to conversations, discussions or meetings that took place between January 1, 1972 and December 31, 1975 involving that person or any other person or any government, crown corporation, agency or other organization in respect of the production, import, export, transportation, refining, possession, ownership, use or sale of uranium or its derivatives or compounds shall (a) release any such note, document or material, or disclose or communicate the contents thereof to any person,

breadth of the regulations effectively precludes our courts from determining whether GAC or Gulf took predatory actions against their competitors in the United States, either as part of the cartel conspiracy or completely independently of it.

It is clear that the Canadian Government does not wish to permit the courts of this country to inquire into whether Gulf exceeded the original scope of the cartel. However, whether Gulf adhered to the limited territorial scope of the cartel as Canada defined it is an inquiry that the act of state doctrine cannot preclude an American court from making. It is for the courts of this country, and not for the government of a foreign state, to determine whether *our* nationals took actions in *our* nation in violation of *our* laws.[42] The existence of cartel evidence indicating that the cartel might have exceeded its original non-United States scope makes it imperative

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government, crown corporation, agency or other organization unless (i) he is required to do so by or under a law of Canada, or (ii) he does so with the consent of the Minister of Energy, Mines and Resources; or (b) fail to guard against or take reasonable care to prevent the unauthorized release of any such note, document or material or the disclosure or communication of the contents thereof.

The Regulations were amended in October 1977, but the amendments are not pertinent to the issues in this case.

[42] On appeal, GAC has contended that a court cannot, without violating the act of state doctrine, "inquire into what was the real scope of the Canadian policy," nor "judge what was the entire contour of the Canadian policy and was anything done outside the contours of that policy."

That that proposition is untenable should be evident. *See* Baker, *supra*, 11 Cornell Int'l L. J. at 177, n. 67. If GAC's position was adopted, then an act of state or sovereign compulsion defense could be irrefutably established by the mere assertion of it by the party seeking its protection.

that our courts be free to conduct such an inquiry in this case.[43]

GAC argues on appeal that United has "failed to show that the cartel either sought to or did harm United"; has "failed to show that the cartel even considered uranium producers"; and has not cited "any competent evidence that the cartel engaged in any predatory activity against anyone." These assertions are entirely beside the point. It is inconsistent for a party to fail to produce records and to then contend that the opposing party has failed to point to any records to support its allegations. We will not accept the proposition that the broad and vague outlines of a foreign government's activities automatically activate a doctrine which provides a total eclipse of the judicial search for the truth.

The absence of cartel records makes the second aspect of Canada's alleged involvement in the cartel—its compulsion of Gulf Canada—equally unavailing to GAC under rubric of the act of state doctrine.

In *Interamerican Refining Corp.* v. *Texaco Maracaibo, Inc.*, 307 F.Supp. 1291, 1297-98 (D. Del. 1970), the court held that where an American corporation is compelled by a foreign government to commit anti-competitive practices, such compulsion constitutes a complete defense to an antitrust action based on those practices. *See also United States* v. *The Watchmakers of Switzerland Information Center, Inc., supra*; K. Brewster, *supra*, at 92-94; W. Fugate, *supra*, at 148-49; Annot., 12 A.L.R.

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[43] The chairman of the Congressional subcommittee which investigated cartel activities concluded that there could not be "any serious doubt . . . that cartel activities did in fact affect domestic American commerce." *Hearings on International Uranium Cartel, supra*, Vol. 1, Serial No. 95-39, p. 247. *See also* the evidence reviewed in Section II B, *supra*, and *Duquesne Light Co., et al.* v. *Westinghouse Electric Corporation*, (No. G.D. 75-23978) (Pa. Ct. of Comm. Pleas, March 30, 1977) (approving settlement).

Fed. 329, 340-43, § 4 (1972); Annot., 40 A.L.R. Fed. 343, 377-79, § 14 (1978). However, "[o]ne asserting the [sovereign compulsion] defense must establish that the foreign decree was basic and fundamental to the alleged antitrust behavior and more than merely peripheral to the overall illegal course of conduct." *Mannington Mills, Inc.* v. *Congoleum Corp., supra,* 595 F.2d at 1293.

The reason why the sovereign compulsion defense cannot be invoked here is because the absence of cartel records makes it impossible to determine precisely what acts, if any, were compelled, and where those acts were performed.[44]

The available cartel evidence bearing on the question of government compulsion is ambiguous and conflicting. The Canadian Government has stated that the participation of all Canadian uranium producers in the cartel was "a matter of Canadian Government policy," which was "implemented through the [Canadian] Atomic Energy Control Act and Regulations." The Government also stated it had "secured compliance with the terms of the [cartel] arrangement." However, Prime Minister Pierre Trudeau stated in response to a question in the Canadian Parliament that the contention "about the government forcing companies into [the cartel] . . . is obviously a spurious argument." He said that "the government had a policy which authorized" the cartel and that the Government had "requested" Canadian uranium producers to act within that policy. *Official Report of House of*

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[44] In his opinion in *In Re Uranium Antitrust Litigation, supra,* 480 F.Supp. at 1154, Judge Marshall indicated that cartel records could have a vital bearing on the defendants' defenses of sovereign compulsion. Thus, he indicated that merely by raising the sovereign compulsion defense, a defendant could not preclude a court from seeking documents located in a foreign country which might be relevant to the merits of that defense. *Compare* GAC's position at n. 42, *supra.*

Commons Debates, Vol. 121, No. 6, p. 224, 3rd Sess., 30th Parliament (Oct. 25, 1977).

The cartel records that have been produced do not substantially clarify this issue. Initially, Gulf described its attendance at early cartel meetings as a response to "a very strong invitation" from the Government to participate in the cartel; Gulf Canada had been "forcefully invited" to attend. From the outset, however, Gulf apparently conditioned its participation upon a determination that it would not result in violations of the United States antitrust laws.

In April 1972, an associate general counsel for Gulf wrote to Gulf's general counsel in Pittsburgh concerning "an agreement" in the making "among producers of uranium." He stated that the producers would present their agreement to the Canadian Cabinet "for approval," and that the Cabinet would thereafter direct the producers to participate in the agreement.[45] He concluded that a decision by Gulf to participate in the cartel was necessary before the cartel's Paris meeting on April 20-21, because "there is no point in our attending the meeting unless we have decided to go along."

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[45] On August 17, 1972, the Canadian Minister of Energy, Mines and Resources wrote to the President of the Canadian Atomic Energy Control Board, informing him that the Canadian Government had approved a regulation governing the export of uranium from Canada "[i]n order to enforce compliance with the terms of the marketing arrangements." The letter began by stating that "[o]n June 29, 1972, [the Canadian] Cabinet approved the terms of a uranium export marketing arrangement [the cartel] *proposed by producers* in Canada and several other countries." (Emphasis added.) One writer suggested that "this document reveals an approval by government of a privately proposed arrangement, which was in turn implemented by government orders." *Baker, supra*, 11 Cornell Int'l L. J. at 183, n. 94. *Compare* W. Fugate, *supra*, at 148 ("[I]f private parties . . . .influence foreign government legislation as part of a conspiracy to restrain United States foreign trade, the

Gulf apparently decided "to go along." Roger Allen, an attorney for Gulf Minerals in Denver, attended the cartel's Paris meeting, along with Gulf Minerals' president, S. A. Zagnoli. However, Gulf was nevertheless still concerned about its possible liability under United States antitrust laws. Allen told the other cartel members that "Gulf management was unwilling to take such a risk and, consequently, any participation by Gulf in the arrangement was conditioned upon receiving an expression from the U. S. Department of Justice satisfactory to Gulf."

The following month, Gulf indicated that although it remained concerned about United States antitrust laws, it otherwise agreed "in principle with the desirability of establishing a marketing arrangement." By June 1972, Allen was reporting that Gulf had decided that it "should not even file a White Paper with the Department of Justice. Gulf Minerals *had agreed to take a business risk. . . .*" (Emphasis added.)

Although by early June 1972, Gulf had established "compulsion" as the "fountainhead" of its antitrust defense, in July 1972, Gulf officials were nevertheless describing "the nature of the Canadian Government activity in fostering the Organization" as "still a bit fuzzy." As late as September 1972, a Gulf attorney stated that Gulf's antitrust problem was aggravated by the "ambiguous role played by the cartel governments." The following month, the same attorney referred to the "interchanging and ambiguous capacities in which the Cana-

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foreign government sanction of some of their activities will not justify their conspiracy" (Footnotes omitted)) *with Cal. Retail Liquor Dealers Ass'n* v. *Midcal Alum.*, 100 S.Ct. 937, 943-44 (1980) ("The State simply authorizes price-setting and enforces the prices established by private parties. . . . The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.")

dian Government had acted." Thus, six months after the government "compulsion" allegedly occurred, Gulf officials were still having difficulty delineating the role played by the Government.

The evidence suggests that Gulf officials took steps designed to bolster the sovereign compulsion defense by encouraging Canada to take a more explicit and less flexible position. As early as May 1972, Mr. Ediger, Gulf Canada's president, advised Mr. Hoffman, a member of the Gulf-United board of directors and a vice-president of Gulf Energy, the predecessor of GAC, that Gulf intended

> to suggest amendments [to the proposed producers' agreement] which will emphasize the fact that our participation is a result of direction from the Canadian government. Therefore, we will likely suggest [adding language] to indicate that Gulf and UCL [Uranez Canada Limited, a German corporation] are complying at the request of the Canadian government. . . .

In September 1972, a Gulf attorney complimented Mr. Ediger for telling the other cartel members that "it was very important for continuity to reside in the [Canadian] Department of E.M.&R. [Energy, Mines, and Resources]." The attorney went on to say:

> Whatever the occasion for expression of this position, Gulf representatives should take advantage of the occasion *and recognize it as the party line.* The more intricately involved the Canadian Government and any of its agencies or Departments becomes and remains in this uranium matter, the better the degree of protection for Gulf. (Emphasis added.)

One reasonable inference that can be drawn from this evidence is that Gulf wanted to be compelled by the Government of Canada; it is not particularly consistent

with the notion that Gulf reacted, "in innocence and good faith, to governmental threats and pressures." Graziano, "Foreign Governmental Compulsion as a Defense in United States Antitrust Law," 7 Va. J. Int'l L. 100, 117 (1967). The evidence does not establish to our satisfaction that Gulf—acting without the intent to restrain competition—innocently responded to foreign governmental pressure. Rather, it would appear that Gulf simply decided "to take a business risk," and thereafter did all it could to minimize that risk by establishing "the effective Canadian Government direction" that it join the cartel as "the fountainhead" of its antitrust defense.

Even if we were to assume, however, that Gulf had been effectively compelled to join and participate in the cartel operations, such compulsion might not provide an all-encompassing defense in this case, for the critical questions upon which application of the act of state doctrine turns would remain unresolved—what *specific* acts were compelled and where did they take place.[46]

United has alleged that GAC and Gulf sought to eliminate it as a competitor in the United States and to monopolize American uranium reserves. It further contends that the 1973 and 1974 Supply Agreements were part of that anti-competitive effort. Even if such actions were "compelled" by a foreign government the act of state doctrine would provide no protection to Gulf or GAC. By definition, the act of state doctrine applies only to the acts of a foreign state "done within its own territory." *Underhill* v. *Hernandez*, *supra*, 168 U.S. at 252. *See also Republic of Iraq* v. *First National City Bank*, *supra*, 353 F.2d at 51. "The doctrine cannot be

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[46] "Today it is clear that a businessman may do no more than what is required by foreign legislative mandate if he is to claim antitrust immunity." 7 Va. J. Int'l L. at 133. *See also* W. Fugate, *supra*, at 148.

used to excuse the commission of illegal acts within the territorial boundaries of the United States." *Linseman* v. *World Hocky Ass'n, supra,* 439 F.Supp. at 1324 (citations omitted). Although the "compulsion" may have occurred in Canada, it is the acts that are compelled, rather than the compulsion itself, that are at issue in the present litigation. The act of state doctrine must apply to those acts, if it is to apply at all.

We cannot agree with the proposition that if a foreign state compels an American corporation to take actions in the United States which are intended to and do have severe adverse consequences to free and fair trade in the United States, the American corporation is thereby immunized from the full force of the laws of its own sovereign.[47] To hold otherwise would render asunder the "cornerstones of this nation's economic policies"—the antitrust laws. *United States* v. *First National City Bank,* 396 F.2d 897, 903 (2nd Cir. 1968).

Our conclusion that the act of state doctrine is inapplicable is supported by the position taken towards the cartel by those branches of the federal government that are responsible for the formulation and execution of foreign policy.

The proposition that the act of state doctrine should not be applied where the executive or legislative branches of the federal government have indicated that the act of a foreign state is not entitled to recognition under that doctrine was first set forth in *Bernstein* v. *N.V. Neder-*

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[47] For authorities supporting the position that the sovereign compulsion defense should be limited to activities conducted solely within the foreign sovereign's territory, *see* Fugate, 49 Va. L. Rev. at 934; Note, "Development of the Defense of Sovereign Compulsion," 69 Mich. L. Rev. 888, 901-02 (1971); 7 Va. J. Int'l L. at 140-42; *United States Department of Justice Antitrust Guide for International Operations,* T. Reg. Rep. (CCH) No. 266, Part II (Feb. 1, 1977).

landsche-Amerikaansche, Etc., 210 F.2d 375, 376 (2nd Cir. 1954). *See generally* Annot., 12 A.L.R. Fed. 707, § 2 [b] (1972). The Bernstein exception to the act of state doctrine was subsequently adopted by three members of the United States Supreme Court in *First Nat. City Bk.* v. *Banco Nacional de Cuba*, 406 U.S. 759, 767-70 (1972). Although the Bernstein exception has never gained the support of a majority of the Supreme Court,[48] neither in *First Nat. City Bk.* nor in any other case has the Court held that the position taken by the executive and legislative branches regarding the subject matter of the particular litigation in which the doctrine is sought to be invoked is irrelevant. The fact that those branches of the federal government which are responsible for the formulation and execution of foreign policy do not consider a certain subject to involve act of state implications is relevant to, but not dispositive of, the question of the applicability of that doctrine.

Both the executive and legislative branches have taken actions with respect to the uranium cartel which are clearly inconsistent with the notion that judicial examination of Gulf's participation in the cartel is precluded by the act of state doctrine.

The United States Government declined to state that this litigation involves "a breach of friendly relations" between the United States and Canada. In a letter transmitting communications from the Canadian Government to the trial court, the State Department stated that it was taking "no position with regard to any of the issues raised" by those letters, and that transmittal of

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[48] Six members of the Supreme Court in *First Nat. City Bk.* rejected the notion that the position of the executive branch is dispositive of the question of the applicability of the act of state doctrine in a particular case.

the letters "should not be understood as having implications with respect to the foreign affairs of the United States." [49]

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[49] GAC has brought to our attention two letters written by the Justice Department to the Seventh Circuit of Appeals and to Judge Marshall in the *Westinghouse* uranium litigation now pending before those courts. *See In Re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980) and 480 F.Supp. 1182, *supra*. On March 18, 1980, the Justice Department sent the Seventh Circuit a letter from the State Department which referred to criticism of foreign governments in a recent decision of that court (*see* 617 F.2d at 1256). The State Department said that this criticism had "caused serious embarrassment to the United States in its relations with some of our closest allies." It stated that "the foreign governments concerned have substantial interest not only in [the *Westinghouse*] litigation, but also in certain broader issues which it raises." It said that although "the United States Government does not share some of the views presented by the foreign governments," it recognized "the genuineness of their concerns," and believed that their views should be considered by the courts because they "may assist the judiciary . . . in making the necessary accommodations between the laws and policies of various sovereign nations."

In May of this year, Associate Attorney General John Shennefield [sic] asked Judge Marshall to give "appropriate deference and weight" to the views and representations of the foreign governments. He stated that because the *Westinghouse* case "implicates foreign policy concerns of both the United States and foreign governments," "it would be inappropriate, *in the absence of bad faith*, to inflict punishment against a defendant . . . for inability to comply with the discovery order of the court because of a contrary foreign criminal law." (Emphasis added.) He urged the court to consider "the consequences of the absence of complete discovery" by reference to the factors identified in *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958).

Unlike the Seventh Circuit's recent decision, nothing either this Court or the trial court below has said in this case was critical of the Government of Canada. In May of this year, the Government of Canada sought leave of this Court to file an amicus curiae brief in this appeal. The motion was filed over two years after entry of the sanctions order and default judgment, and one year after the case had been argued to this Court. No reason was given for

More significantly, the federal government has affirmatively sought to apply the laws of this country to Gulf's cartel activities. A Congressional subcommittee held hearings on the cartel. *See Hearings on International Uranium Cartel, supra.* A federal grand jury was impaneled to investigate the cartel. *In Re Grand Jury Investigation of Uranium Industry*, Misc. 78-0173, F.S. 78-0166 (D.D.C. 1978). In May 1978 the Justice Department filed a criminal information against Gulf, charging it with violations of the Sherman Antitrust Act, to which Gulf pled *nolo contendere. United States* v. *Gulf Oil Corp.*, Cr. No. 78-123 (W.D. Pa. 1978).[50]

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the delay in filing the motion, and accordingly, it was denied. In any case, the views of the Canadian Government were presented to the trial court, and are part of the record on appeal. We have fully considered them in reaching our decision. Like the State Department, however, we do not share some of the Canadian Government's views, though we have given full credence to their representations. The State Department's statement that the views of the foreign governments involved "may assist the judiciary . . . in making the necessary accommodations between the laws and policies of the various sovereign nations," is inconsistent with the notion that judicial examination of the matters at issue is precluded by the act of state doctrine. It is worth noting that neither the State nor the Justice Department has communicated similar concerns either to the court below or to this Court over the course of this litigation. Finally, the default judgment imposed in this case was based on findings that GAC acted in bad faith. Those findings are supported by the record; and they are consistent with the requirements of *Societe Internationale* (*see* Section III A, *infra*), and the concerns the Justice Department expressed in its most recent letter concerning the *Westinghouse* litigation.

[50] The Antitrust Division of the Justice Department has an established policy regarding the application of American antitrust laws to the international activities of American corporations which is consistent with the actions taken by the Division regarding this cartel and with the discovery orders entered in this case. In the *Antitrust Guide for International Operations*, (*see* n. 47, *supra*), the Justice Department discusses its position concerning the application of the act of state doctrine to two hypothetical situations (cases "K" and "L") that have a direct bearing on the allegations against GAC and Gulf in this case.

The actions taken by both the legislative and executive branches regarding the cartel, and the detailed position the Justice Department has adopted in the general area of the extra-territorial application of United States antitrust laws (*see* n. 50, *supra*), are persuasive evidence that the branches of the federal government having responsibility for the conduct of foreign affairs do not consider the cartel activities of a major United States corporation to be immune from examination by the courts of this country.

These actions are more than a simple statement that the United States Government does not consider the act of state doctrine to be applicable to specific litigation involving private parties. The Government's position is also not merely an isolated instance involving a single corporation and a specific cartel. *See* n. 50, *supra*. Therefore, there is little danger that judicial deference to the executive branch's position will make the judiciary "a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from the fire, but not others." *First Nat. City Bk.* v. *Banco Nacional de Cuba*, *supra*, 406 U.S. at 773 (footnote omitted) (Douglas, J., concurring).

The fact that these actions involved the public enforcement of the antitrust laws, rather than a civil antitrust action by a private litigant, is immaterial. Recognition of such a distinction would further no national interest. As one commentator noted:

> It would seem that where the branches responsible for formulation of foreign policy have subordinated the sensitivity of foreign governments to having their acts of a particular sort explored in American courts that, at least after a successful prosecution of the American concern, the act of state doctrine should not stand in the way of the injured competitor's antitrust claim. In such a case, the act of state

> doctrine would thwart antitrust enforcement policies without furthering any separation of powers (judicial non-interference with foreign policy) values. . . . [T]he decision to review a foreign sovereign's act has already been contemplated by the statute and . . . already occurred in a prosecution.

Note, "Sherman Act Jurisdiction and the Acts of Foreign Sovereigns," 77 Colum. L. Rev. 1247, 1261 (1977) (footnote omitted).

The antitrust laws of this State and nation contemplate both public and private actions against those who may have violated them.[51] They do not envision, nor should they be applied in such a way as to bring about, the anamolous [sic] situation in which the public interest is vindicated by the imposition of a fine of several thousand dollars, but in which the private interest is frustrated by enforcement of a multi-million dollar judgment against what may have been a harmed competitor. To permit such a situation to exist could further the very anticompetitive and monopolistic goals which the multi-national corporation is alleged to have sought to achieve and which the antitrust laws were designed to prevent.[52]

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[51] *United States* v. *Borden Co.*, 347 U.S. 514, 518 (1954); *Battle* v. *Liberty National Life Insurance Company*, 493 F.2d 39, 52 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975); *In Re Uranium Antitrust Litigation*, *supra*, 480 F.Supp. at 1154.

Sections 57-1-1 and 57-1-2, N.M.S.A. 1978, make certain anticompetitive trade practices a crime in New Mexico. Section 57-1-3, N.M.S.A. 1978, provides a private party with a cause of action for damages it suffers by reason of the same practices.

[52] "Private litigation under the antitrust laws plays an important role in the enforcement of antitrust violations. It supplements public enforcement, 'increases the likelihood that a violator will be found out, greatly enlarges his penalties, and thereby helps discourage illegal conduct.'" Wechsler, "New Mexico Restraint of Trade Statutes—A Legislative Proposal," 9 N.M. L. Rev. 1, 20 (1979) (footnote omitted).

b. *Exclusive Federal Power Over Foreign Affairs*

GAC claims that even if the act of state doctrine does not bar an American court from examining Gulf's cartel-related actions, the principle of exclusive federal power over the conduct of foreign relations nevertheless precludes an American *state* court from conducting such an examination.[53]

GAC relies on *Zschernig* v. *Miller*, 389 U.S. 429 (1968), in which the United States Supreme Court struck down an Oregon intestacy statute as it had been applied by the Oregon Supreme Court. 243 Or. 567, 412 P.2d 781 (1966). The Oregon statute required that in order to take property belonging to an Oregon resident by succession or testamentary disposition a non-resident alien had to prove that (1) American residents had a reciprocal right to inherit in the alien's country; and (2) the non-resident alien would be able to receive "the benefit, use or control" of the proceeds of the Oregon estate "without confiscation" by his government.

In *Zschernig*, the Court held that, as applied, the statute constituted an impermissible intrusion by the state into foreign affairs, an area which the Court said was entrusted by the United States Constitution solely to the President and Congress. The Court said that the statute required local probate courts to launch "minute inquiries" into the nature of foreign governments, the quality of rights which those governments accorded to both American citizens and their own citizens, the credi-

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[53] Although similar to the act of state doctrine, this second principle is distinct in that the former looks to the power of American courts in general, whereas the latter is concerned with the power of an American *state* court. The act of state doctrine rests on the principle of separation of powers between branches of the federal government; the principle of exclusive federal power over the conduct of foreign relations is based on the concept of federalism.

bility of the representations of officials of foreign governments, and the actual administration of foreign legal systems. *Zschernig*, at 433-35.

GAC contends that the *Zschernig* decision precludes state courts from exercising jurisdiction over issues relating to the foreign cartel because of the Canadian Government's relationship to the cartel. GAC argues that because the trial court was without jurisdiction to consider the cartel-related issues, it could not enter discovery orders directing the production of cartel documents.

The *Zschernig* decision, which has not been applied by the United States Supreme Court outside of the limited context of the alien inheritance statutes at issue in that case, has nothing to do with this case. Unlike the statute at issue in *Zschernig*, the causes of action involved in this case are universally accepted by American jurisdictions—fraud, breach of fiduciary duty, commercial impracticability, economic coercion and antitrust. The effective enforcement of the antitrust laws is essential to the maintenance of free and fair business competition.[54] Unlike the alien inheritance statutes in *Zschernig*,[55] the causes of action in this case do not

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[54] "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States* v. *Topco Associates*, 405 U.S. 596, 610 (1972).

"So crucial are antitrust laws to the economy of the state that the New Mexico Constitution [Art. IV, § 38] mandates the enactment of laws 'to prevent trusts, monopolies and combinations in restraint of trade.'" Wechsler, 9 N.M. L. Rev. at 22.

[55] These statutes had largely been applied to communist countries. In the years following their passage, the statutes were subject to widespread criticism by legal scholars for being unsound legislation which had been both ineffective and prejudicially applied. *See e.g.* the authorities cited in 32 Alb. L. Rev. 646, 649, n. 15

involve questionable attempts by states to directly affect the rights of citizens in foreign nations, nor are they related to the foreign policy attitudes of this or any other state court.

In this litigation the courts of this State have not undertaken the type of analysis that *Zschernig* prohibits. No pejorative criticism has been directed at Canada or any other foreign government. No minute inquiry has been made into the actual administration of foreign law by a foreign government, or into the rights that such a government affords to its own citizens. The veracity of the representations of its diplomats has not been questioned. This case involves nothing more than an inquiry into what an *American* corporation has done *in America*, a situation which finds no appropriate analogy in *Zschernig* or its exceedingly limited progeny.

The states of this country have little interest in how a foreign government treats its own citizens, but they have every conceivable interest in anti-competitive conduct by American corporations occurring within their own borders. Likewise, foreign governments have a legitimate interest in the rights they choose to afford their own citizens; but they have no legitimate interest in whether a state court in this country will lend its judicial processes to the enforcement of contracts entered into in the United States by corporations based in this country for the supply of a resource to be mined and milled in the United States. Our courts have done no more than seek to enforce state laws which are con-

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(1968). In applying these statutes, state courts had on occasion criticized foreign governments in strong and intemperate language. *See* examples cited in *Zschernig*, *supra* at 437-39, n. 8, and in 82 Harv. L. Rev. at 239, n. 8. Commentators were virtually unanimous in condemning these statutes and in applauding the *Zschernig* decision. One said: "[C]learly the state has no interest in inquiries of the sort which [*Zschernig*] condemned." 82 Harv. L. Rev. at 245. *See also* 32 Alb. L. Rev. at 653-54.

sistent with federal laws, and with actions of the United States Congress [56] and the United States Justice Department concerning Gulf's cartel activities. We therefore hold that neither *Zschernig* nor the act of state doctrine precludes the courts of New Mexico from litigating the cartel-related issues present in this case, or from seeking the production of documents which will facilitate the resolution of such litigation.

2. *Canada's Uranium Information Security Regulations*

GAC also contends that the trial court's discovery orders commanded conduct in violation of the Canadian Uranium Information Security Regulations, and were therefore prohibited by the act of state doctrine and the *Zschernig* decision.

a. *Act of State Doctrine*

Clearly, the Uranium Information Security Regulations were an act of state. They were promulgated by the Canadian Government pursuant to the Canadian Atomic Energy Control Act. They have been upheld by Canadian courts. The Regulations have been considered by both the Canadian executive and judicial branches to be in the public interest of Canada. However, it does not follow that because the Regulations were an act of state, the discovery orders were precluded by the act of state doctrine.

The trial court never ordered GAC, Gulf, or Gulf Canada to violate the Regulations, and never questioned the validity of those Regulations. In October 1977, the

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[56] It is worth noting that the Congressional subcommittee investigating the cartel held several of its hearings in unprecedented joint sessions with a committee of the New York State Assembly in order to assist that state's independent investigation of the cartel. *Hearings on International Uranium Cartel, supra*, Vol. I, Serial Nos. 95-39, p. 130 and No. 95-95, p. 1.

court ordered GAC to produce all non-privileged cartel records, "[*i*]*nsofar as it is lawful so to do.*" (Emphasis added.) The court went on to say that "to the extent that it might be a violation of Canadian law to produce . . . [cartel] documents housed in Canada," GAC had an obligation to "make an immediate diligent and good faith effort to obtain a *lawful* waiver of or dispensation from such Canadian prohibitions and to the extent thereafter *lawful* at the earliest possible date, actually produce for inspection and copying of such documents." (Emphasis added.) In subsequent orders the trial court expressly refused to order identification or production of cartel documents in violation of Canadian law. Instead, it relied on Rule 37 sanctions to redress the dilemma resulting from the absence of the documents or the identification thereof.[57]

Further, the act of state doctrine is inapplicable insofar as the Regulations are concerned under the decision of the United States Supreme Court in *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958). In that case the plaintiff, a Swiss holding company, had assets seized by the Alien Property Custodian during the Second World War pursuant to the Trading With The Enemy Act. After the War, the plaintiff filed suit against the Attorney General of the United States seeking to recover the property on the ground that it had not been an enemy within the meaning of the Act. The

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[57] In ordering production of Gulf's Canadian cartel documents in the Westinghouse litigation, Judge Marshall rejected the very same act of state argument GAC advances here. He stated:

> Plaintiffs have not challenged the validity of any of the foreign nondisclosure laws which are relied on by defendants. The issue is not whether those laws are valid, but rather, conceding their validity, whether they excuse defendants from complying with a production order.

In Re Uranium Antitrust Litigation, supra, 480 F.Supp. at 1149.

Government sought production of records which were in the possession of a Swiss banking company controlled by the plaintiff, which it claimed were relevant to the issue of the plaintiff's alleged "enemy taint." The plaintiff failed to produce the documents because Swiss law prohibited production of the records. The district court dismissed the plaintiff's complaint, *Societe Internationale, Etc.* v. *McGranery*, 111 F.Supp. 435 (D. D.C. 1953). The Court of Appeals affirmed. *Societe Internationale* v. *Brownell*, 95 U.S. App. D.C. 232, 225 F.2d 532 (D.C. Cir. 1955). The Supreme Court unanimously reversed the two lower courts.

Two aspects of the Supreme Court's decision are pertinent to this case—first, the propriety of a court's order to produce records located in a foreign country whose laws prohibit disclosure of the records; and second, the appropriateness of the sanctions imposed for a party's failure to comply with such an order where the failure is due to the proscriptions of foreign law. In this section of the opinion, we are concerned only with the first question; the latter aspect is considered in Section III A, *infra*.

In *Societe Internationale*, the Court stated:

> Whatever its reasons, petitioner did not comply with the production order. Such reasons, and the willfulness or good faith of petitioner, can hardly affect the fact of noncompliance and are relevant *only* to the path which the District Court might follow in dealing with petitioner's failure to comply.

357 U.S. at 208 (emphasis added). This passage implies that foreign nondisclosure laws are not relevant to the propriety of production orders. Rather, it states that the reason for non-production is relevant *only* to the question of appropriate sanctions for noncompliance with the order. This distinction is significant. *In Re Westing-*

house Elec. Corp. Uranium, Etc., 563 F.2d 992, 997, 999 (10th Cir. 1977); *Arthur Andersen & Co.* v. *Finesilver*, 546 F.2d 338, 341 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977); *In Re Uranium Antitrust Litigation, supra*, 480 F.Supp. at 1144-48; Wright, "Discovery," 35 F.R.D. 39, 81 (1963); Note, "Discovery of Documents Located Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-production," 14 Va. J. Int. L. 747, 753 (1974).

In *Societe Internationale* the Court did not refer to the act of state doctrine or to principles of international comity. The reason for that lack of reference to these principles is simple. Neither in *Societe* nor in this case did the trial court order a litigant to violate the non-disclosure laws of the foreign sovereign. Neither court criticized the foreign sovereign or its laws, or engaged in an examination of such laws or the motivations which gave rise to them. Both courts sought only to maintain the integrity of the judicial process and the efficacy of the laws upon which the cause of action in each case was based. In both cases, those laws reflected very significant policies of this country.[58]

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[58] In his recent decision ordering Gulf and other parties in the *Westinghouse* litigation to produce cartel records located in Canada and elsewhere, United States District Judge Marshall stated that "the policies supporting an inquiry into corporate activities and structure are at least as weighty, and probably stronger, with the antitrust statutes here than they were with the Trading with the Enemy Act in *Societe Internationale*." *In Re Uranium Antitrust Litigation, supra*, 480 F.Supp. at 1154 (citation omitted).

In a decision rendered on March 18 of this year, the Supreme Court of Canada denied an application of Gulf Oil for letters rogatory to secure cartel documents located in Canada. *Gulf Oil Corp.* v. *Gulf Canada Ltd.* (Slip Op. March 18, 1980). Gulf sought the letters in order to comply with discovery orders entered by Judge Marshall in the *Westinghouse* litigation. *See In Re Uranium Antitrust Litigation, supra*, 480 F.2d 1138. The Canadian high

b. *Exclusive Federal Power over Foreign Relations*

The principles set forth in *Zschernig* v. *Miller*, *supra*, are inapplicable to the Uranium Information Security Regulations for largely the same reasons that the act of state doctrine does not apply. The discovery orders in this case which sought cartel document production involved none of the problems the Supreme Court was confronted with in *Zschernig*. *See e.g.*, n. 55, *supra*, and accompanying text.

D.

APPLICABILITY OF NEW MEXICO ANTITRUST ACT

The last issue we consider concerning the propriety of the trial court's discovery orders involves the applicability of the New Mexico Antitrust Act, Sections 57-1-1 to 57-1-3, N.M.S.A. 1978.[59] Although GAC filed a counter-

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court stated that the Canadian Government's "resistance to disclosure was not so much a matter of the maintenance of secrecy as it was of an assertion of Canadian sovereignty to resist the extra-territorial application of United States anti-trust laws." The court stated that it failed to see how such a policy "can be ignored in the interests of comity towards a foreign court, as if the policy was essentially a reflection of private considerations without any public, governmental interest." But it stated: "It may be that different considerations will operate where a Canadian court is concerned with Canadian litigation arising out of issues turning on Canadian law."

The antitrust issues in this litigation reflect more than "private considerations without any public, governmental interest." *See* n. 54, *supra*. We cannot subscribe to the idea that the fundamental public policy which the antitrust laws embody must be ignored in the interests of comity towards the policy of a foreign state, particularly where the highest court of that state intimates that it would not necessarily be bound by the same policy of its own government in litigation "turning on Canadian law."

[59] In 1979, the New Mexico Legislature substantially revised the Antitrust Act. *See* N.M. Laws 1979, ch. 374, §§ 1-18 (codified as Sections 57-1-1 to 57-1-15, N.M.S.A. 1978 (Supp. 1979)). In this case, we are concerned with the prior act, Sections 57-1-1 to 57-1-3, N.M.S.A. 1978.

claim alleging that United had violated the New Mexico Antitrust Act, it now contends that that Act may not be applied to the specific commerce at issue in this case (the 1973 and 1974 Supply Agreements and the I&M contract) and to the activities of the international uranium cartel. GAC argues that if the Act does not apply, discovery orders pertaining to allegations of violations of the Act could not be entered, and therefore, sanctions could not be imposed for a failure to comply with such orders.[60]

1. *The Commerce Clause*

GAC's first contention is that the Commerce Clause of the United States Constitution [61] bars the application of state antitrust laws to activities which occur exclusively or overwhelmingly in interstate and foreign commerce. GAC argues that the supply and utility contracts in this case have no immediate relationship to the State of New Mexico, and, therefore, that they involve only interstate commerce. Further, GAC argues that the cartel's operations were concerned solely with foreign commerce.

It is well-settled that the federal power to regulate commerce is not exclusive, and that states have the in-

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[60] GAC's argument as to the inapplicability of the New Mexico Antitrust Act relates only to the antitrust issues in this case. However, as we have already held, the information and documents sought were also relevant to United's claims of fraud, breach of fiduciary duty, economic coercion and commercial impracticability. The judgment for I&M was based on commercial impracticability under Section 55-2-615, N.M.S.A. 1978. GAC makes no claim that trial of these issues was precluded by the Commerce Clause or the Sherman Antitrust Act.

[61] U.S. Const., Art. I, § 8, cl. 3 provides:

> "The Congress shall have Power . . . to regulate Commerce with the foreign Nations, and among the several States, and with the Indian Tribes. . . ."

herent police power to regulate commerce within their borders, even though such activities may include or affect interstate and foreign commerce. *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware*, 414 U.S. 117, 140 (1973); *Cities Service Co.* v. *Peerless Co.*, 340 U.S. 179, 186 (1950); *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 766-67 (1945); *K. S. B. Tech. Sales* v. *North Jersey, Etc.*, 75 N.J. 272, 381 A.2d 774, 784 (1977). Specifically, a state may exercise its power by removing restraints on the trade and commerce of that state even though interstate commerce may thereby be affected. *Giboney* v. *Empire Storage Co.*, 336 U.S. 490, 495 (1949); *Watson* v. *Buck*, 313 U.S. 387, 403-04 (1941); J. Flynn, *Federalism and State Antitrust Regulation* 63 (1964).

The following standards for the states' power to regulate commerce were established in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

> Where the [state] statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

See also Philadelphia v. *New Jersey*, 437 U.S. 617, 624 (1978).

Thus, the first inquiry is whether the state regulation effectuates "a legitimate local public interest." There are two aspects to this requirement. First, the type of regulation—here antitrust—must be one within the state's

inherent police powers. Second, the specific activity to which the state regulation is applied in a particular case must involve a matter of local concern which is "local in character and effect." *Southern Pacific Co.* v. *Arizona*, *supra*, 325 U.S. at 767.

It has consistently been held that the type of regulation at issue here—the prevention of anti-competitive, monopolistic and predatory trade practices—is a legitimate exercise of the state's inherent police powers. *See United Nuclear Corp.* v. *General Atomic Co.*, *supra*, 93 N.M. at 124-27, 597 P.2d at 309-12 (1979); *Giboney* v. *Empire Storage Co.*, *supra*; *German Alliance Ins. Co.* v. *Hale*, 219 U.S. 307, 316-17 (1911); J. Flynn, *supra*, at 76-77.

GAC's principal argument is that the second element of "a legitimate local public interest" is not present in this case because the specific contracts at issue and the uranium cartel are not "local in character and effect." GAC relies on four points to support its position. First, the cartel had "no immediate relationship" to New Mexico and never conducted meetings in this state. GAC contends that cartel operations were "plainly in foreign commerce outside the United States." Second, none of the entities involved in this case are incorporated in New Mexico. Third, the 1973 Supply Agreement was not executed in and does not require the performance of any act in New Mexico. Fourth, the uranium market is national in scope.

We are not persuaded that the matters at issue in this case occurred exclusively in interstate and foreign commerce and had no significant local aspects. It has been recognized that state antitrust laws may reach up to include the regulation of interstate commerce. *See R.E. Spriggs Co.* v. *Adolph Coors Company*, 37 Cal. App. 3d 653, 112 Cal. Rptr. 585, 589 (Ct. App. 1974); J. Flynn, *supra*, at 71, and cases cited therein at n. 251; Wechsler,

9 N.M. L. Rev. at 3. As the Massachusetts Supreme Judicial Court stated:

> If State laws have no force as soon as interstate commerce begins to be effected, a very large area will be fenced off in which the States will be practically helpless to protect their citizens without, so far as we can perceive, any corresponding contribution to the national welfare. (Citation omitted.)

Commonwealth v. *McHugh*, 326 Mass. 249, 93 N.E.2d 751, 762 (1950) (citation omitted).[62]

We cannot agree that the outer limit of the exercise of that power—activity of a wholly interstate nature—has been exceeded in this case. The contracts at issue may be regarded as having no immediate relationship to New Mexico only by relying upon the formalities—the domicile of the parties to the contracts, the place of performance, and the place the contracts were entered into—and ignoring the practical realities.

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[62] GAC relies on the case of *Kosuga* v. *Kelly*, 257 F.2d 48 (7th Cir. 1958), *aff'd on other grounds*, 358 U.S. 516 (1959), in which the court held that the Illinois Antitrust Act did not apply to a contract for the sale of onions in interstate commerce. That decision indicated that the scope of the Illinois Act extended solely to intrastate commerce. *See Henry G. Meigs, Inc.* v. *Empire Petroleum Company*, 273 F.2d 424, 430 (7th Cir. 1960); *R.E. Spriggs Co.* v. *Adolph Coors Co.*, *supra*, 112 Cal. Rptr. at 591. To the extent that *Kosuga* held state antitrust laws to be generally inapplicable to transactions involving interstate commerce, we decline to follow it. The language in *Kosuga* which supports such a holding has been criticized for its lack of authority and reasoning. *See R.E. Spriggs Co.* v. *Adolph Coors Co.*, *supra*, 112 Cal. Rptr. at 591; J. Flynn, *supra* at 74-75; Pollack, "Federal Preemption and State Antitrust Enforcement," 43 Chi. Bar Record 145 (1961). *Kosuga* relied on a reference to *Corpus Juris Secundum*, but the cases cited by *C.J.S.* do not stand for the proposition stated in the text. Two years after *Kosuga*, the Seventh Circuit applied a Wisconsin antitrust law to a transaction involving interstate commerce. *Henry G. Meigs, Inc.* v. *Empire Petroleum Company*, *supra*.

United alleges that the 1973 and 1974 Supply Agreements were part of a conspiracy to monopolize uranium reserves in the United States and to eliminate it as a competitor in the uranium market. As of 1975, over one-half of the uranium reserves of the United States were located in New Mexico. In all but one year from 1966 to 1976, in excess of forty percent of the annual production of uranium in the United States came from New Mexico mines. As of 1976, over fifty percent of the uranium mining work force in this country and nearly forty percent of the uranium milling work force were located in New Mexico. Nearly half of the capacity of American uranium production mills are in this State. Gulf's New Mexico Mt. Taylor uranium reserves constitute the largest uranium ore body in the United States. United's mine at Churchrock, New Mexico, which GAC is alleged to have attempted to gain control of as part of the monopolistic conspiracy, is the largest underground uranium mine in the United States. Therefore, it would be impossible to monopolize the American uranium market without having an immediate relationship to, and a substantial effect on, the trade and commerce of this State.

Although the contracts at issue do not formally require any activity to take place here, almost all of United's uranium production is from New Mexico mines. New Mexico is also the site of its only uranium mill, which is the place of delivery under the terms of the 1974 Supply Agreement. In its brief on appeal, GAC conceded that New Mexico is "the state in which [United's] operation is located." The uranium sales efforts of GAC and its predecessors were based on Gulf production in New Mexico, foreign uranium imports, and purchases on the open market. Those purchases also included substantial amounts of New Mexico uranium. *See* Section II B, *supra*.

It is simply not the case that this litigation involves exclusively interstate commerce and that this State has no interest in its adjudication. *United Nuclear Corp.* v. *General Atomic Co., supra*, 90 N.M. at 101-02, 560 P.2d at 165-66. Therefore, we hold that the State of New Mexico has "a legitimate local public interest" in the application of its antitrust laws to this case.

The remaining inquiries are whether the state law as applied here (1) "regulates evenhandedly" and (2) has only "incidental" effects on interstate commerce. There is clearly nothing in the New Mexico Antitrust Act or in its application to this case which entails any discrimination against interstate goods or which favors local commerce over the commerce of sister states. *Compare Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 125-26 (1978) with *Dean Milk Co.* v. *Madison*, 340 U.S. 349 (1951). GAC makes no contention to the contrary.[63] Further, GAC has made no showing whatsoever that the application of state antitrust laws to this case will have *any* adverse effects on "the free flow of commerce across state lines." *Southern Pacific Co.* v. *Arizona, supra*, 325 U.S. at 770. The very purpose of these laws is to remove privately created restraints on free trade.

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[63] GAC does suggest New Mexico will be benefited by invalidation of the contracts because United will be permitted to sell the uranium at higher prices, thus increasing local tax revenues and forcing out-of-state consumers to pay higher utility rates. However, any such consequences are entirely indirect results of the application of laws which, on their face, have no discriminatory aspects. GAC, of course, seeks to avoid its obligations to I&M, which, if successful, would have precisely the same effect on I&M's customers. Furthermore, if United were to sell any of this uranium for use inside New Mexico, New Mexico consumers would pay the same higher price. It is also interesting to note that GAC's argument that higher uranium prices will result in higher tax revenues in this State is based on GAC's recognition that the uranium would have been supplied from New Mexico sources.

> Consequently, it would be difficult to prove that a policy which removes privately instituted interferences, delays, interruptions, and inconveniences with interstate commerce, is itself a delay, interference, interruption, and inconvenience to interstate commerce when enforced at the local level by the states.

J. Flynn, *supra*, at 84.

GAC nevertheless contends that because the uranium market is "national in scope," and because uranium is "vital to the military posture of the United States" and to federal energy policy, "legal and policy questions involving uranium in the uranium industry must be addressed uniformly by the federal government." GAC argues that application of state antitrust laws to such matters "is too fraught with a potential for inconsistent results, lack of uniformity, and consequent burdens upon interstate commerce."

GAC places principal reliance on *Flood* v. *Kuhn*, 407 U.S. 258 (1972), *aff'g*, 443 F.2d 264 (2nd Cir. 1971), *aff'g*, 316 F.Supp. 271 (S.D. N.Y. 1970), in which the Supreme Court upheld lower court rulings that the reserve clause in professional baseball contracts was not subject to challenge under state antitrust laws. Previous decisions of the Supreme Court had held that professional baseball was not subject to federal antitrust laws. *Toolson* v. *New York Yankees*, 346 U.S. 356 (1953); *Federal Club* v. *National League*, 259 U.S. 200 (1922). In *Flood* the lower courts had held that "the nationwide character of organized baseball combined with the necessary interdependence of the teams requires that there be uniformity in any regulation of baseball and its reserve system." 316 F.Supp. at 279-80. *See* 443 F.2d at 267-68.

In affirming the lower courts' decisions, the Supreme Court did not adopt any broad or rigid limitations on the applicability of state antitrust laws to transactions in-

volving interstate commerce. The Court upheld those holdings "[a]s applied to organized baseball, and in the light of this Court's observations and holdings in *Federal Baseball*, [and] in *Toolson*. . . ." 407 U.S. at 284.

We believe that *Flood* is readily distinguishable from this case. First, the time honored, though unusual, exemption from federal antitrust laws which professional baseball enjoys would be meaningless if state antitrust laws were not also inapplicable. Thus, in *Flood* there was a clear conflict between federal and state antitrust enforcement policies.

Second, professional baseball is significantly different from the uranium market. Baseball involves "a complex web of franchises, farm teams and recruiters. . . ." 443 F.2d at 267. Baseball clubs are organized into leagues and

> are dependent on the league playing schedule. . . . Therefore, it is the league structure at which any state antitrust regulation must be aimed. . . . [E]ach league extends over many states, and . . . , if state regulation were permissible, the internal structure of the leagues would require compliance with the strictest state antitrust standard.

Id. at 267-68.

No single state has a particularly significant interest in the operation of nationwide professional sports. However, this State has a very substantial relationship to uranium production, and therefore, a significant interest in preventing anti-competitive practices in the uranium industry. Moreover, in energy-related matters, unlike professional baseball, there is uniformity of treatment of anti-competitive practices under both federal and state law. Challenging such activities is federal policy. Chal-

lenging the uranium cartel and Gulf's role therein was the federal practice.[64]

The fact that the uranium market is nationwide in scope does not require a different result. In *Flood*, state antitrust regulations would have directly affected the entire "complex web" of professional baseball, and would have been aimed at league structure. In this case, the state law has been applied solely to private contracts for the sale of specific goods. In *Flood* the reserve clause being challenged was a recognized practice in the sport. Here, the alleged conspiracy was a secret attempt to dominate an industry, a practice condemned by the Congress, the Justice Department, and the courts. If the fact that the commerce at issue involved a national market were enough to render state law invalid, the states' power to regulate anti-competitive practices would be effectively destroyed.

In *Exxon Corp.* v. *Governor of Maryland*, *supra*, the United States Supreme Court rejected a similar argument advanced by Gulf and other oil companies regarding the national scope of the petroleum industry and a state statute that regulated aspects of that industry in Maryland. The Court said:

> [W]e cannot adopt appellants' novel suggestion that because the economic market for petroleum products

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[64] *See* n. 50, *supra*, and accompanying text. In addition to the hearings held on the anti-competitive practices of the cartel (*see Hearings on International Uranium Cartel*, *supra*), in 1975 another subcommittee of the U.S. House of Representatives held extensive hearings on competition in the energy industry. *Energy Industry Investigation: Hearings Before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary*, 94th Cong., 1st Sess., Serial No. 48-49, Parts 1-2 (1975). (Gulf submitted a report on its uranium business as part of those hearings. The report did not, however, reveal Gulf's role in the uranium cartel).

> is nationwide, no State has the power to regulate the retail marketing of gas. Appellants point out that . . . the cumulative effect of this sort of legislation may have serious implications for their national marketing operations. While this concern is a significant one, we do not find that the Commerce Clause, by its own force, pre-empts the field of retail gas marketing. . . . [T]his Court has only rarely held that the Commerce Clause itself pre-empts an entire field from state regulation, and then only when a lack of national uniformity would impede the flow of interstate goods. . . . In the absence of a relevant congressional declaration of policy, or a showing of a specific discrimination against, or burdening of, interstate commerce, we cannot conclude that the States are without power to regulate in this area.

437 U.S. at 128-29 (citations and footnote omitted).

No showing has been made that application of New Mexico law entails "a specific discrimination against, or burdening of, interstate commerce." No embargo has been placed on interstate shipments of uranium. *Compare Penna.* v. *West Virginia*, 262 U.S. 553 (1923) *and West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911). Unlike other situations in which state regulations have been invalidated under the Commerce Clause,[65] there is little likelihood that in the area of state antitrust laws an excessive cost of compliance will be imposed by piecemeal state regulation. The cost of compliance is nothing more than refraining from the kind of anti-competitive, predatory trade practices which federal law and the laws of virtually all states condemn. The pervasiveness of

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[65] *See e.g., Bibb* v. *Navajo Freight Lines*, 359 U.S. 520 (1959) (state law required change of mudguards on interstate carriers at state line); *Southern Pacific Co.* v. *Arizona, supra,* (state law required change in length of trains at state line).

antitrust regulation in the economy demonstrates a uniformity between state and federal laws which was not present in *Exxon Corp.* v. *Governor of Maryland, supra.* Therefore, the New Mexico Antitrust Act was applied consistently with the Commerce Clause of the federal constitution.

2. *Preemption by Sherman Antitrust Act*

GAC's second claim is that the New Mexico Antitrust Act is preempted by the Sherman Antitrust Act in the context of this case.

Congress has the unquestioned power to preempt state regulations in the field of interstate and foreign commerce.[66] Preemption may be ascertained from the express language of the federal statute,[67] by reference to the statute's legislative history[68] or from a clear inconsistency, repugnancy, or serious danger of conflict between the state and federal regulations.[69] However, none of these sources evidence a Congressional intent to preempt state antitrust laws in the circumstances present in this case.

We begin with the well-established principle that "in a field which the States have traditionally occupied," "the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and

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[66] *De Canas* v. *Bica*, 424 U.S. 351, 357 (1976); *Southern Pacific Co.* v. *Arizona, supra*, 325 U.S. at 769.

[67] *Florida Avocado Growers* v. *Paul*, 373 U.S. 132, 146-47 (1963); *Campbell* v. *Hussey*, 368 U.S. 297, 300-01 (1961); J. Flynn, *supra*, at 119.

[68] *De Canas* v. *Bica, supra*, 424 U.S. at 358; *City of Burbank* v. *Lockheed Air Terminal*, 411 U.S. 624, 634-37 (1973); J. Flynn, *supra*, at 125.

[69] *Florida Avocado Growers* v. *Paul, supra*, 373 U.S. at 146; *Pennsylvania* v. *Nelson*, 350 U.S. 497, 505 (1956).

manifest purpose of Congress. (Citations omitted.)" *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). *See also Florida Avocado Growers* v. *Paul, supra*, 373 U.S. at 146.

Nothing in the language of the Sherman Act expresses any intent to preempt state antitrust laws, many of which were enacted prior to the Sherman Act. *See United Nuclear Corp.* v. *General Atomic Co., supra*, 93 N.M. at 125, 597 P.2d at 310; J. Flynn, *supra* at 90-91. The legislative history of the Sherman Act indicates that, rather than intending to supersede state antitrust laws, Congress was seeking to supplement the enforcement of those laws. *See* remarks of Senator Sherman quoted in *United Nuclear Corp.* v. *General Atomic Co., supra*, 93 N.M. at 125, 597 P.2d at 310. *See also* H.R. Rep. No. 1707, 51st Cong., 1st Sess. 1 (1890). This legislative history has been interpreted as evidence of a lack of an intent to preempt state antitrust laws. *United Nuclear Corp.* v. *General Atomic Co., supra*, 93 N.M. at 125, 597 P.2d at 310; *R. E. Spriggs Co.* v. *Adolph Coors Co., supra*, 112 Cal. Rptr. at 589.

Preemption may also be inferred where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to regulate,[70] or where the state act touches a field in which the federal interest is so dominate that state regulation might interfere with the federal purposes,[71] or where there is a "direct and positive" conflict or repugnancy between the state and federal laws.[72]

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[70] *See e.g., Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978); *City of Burbank* v. *Lockheed Air Terminal, supra*, 411 U.S. at 633; *Rice* v. *Santa Fe Elevator Corp., supra*, 331 U.S. at 230; Note, "The Commerce Clause and State Antitrust Regulation," 61 Colum. L. Rev. 1469, 1477-78 (1961).

[71] *Id.*

[72] *Kelly* v. *Washington*, 302 U.S. 1, 10-11 (1937). *See also R.E. Spriggs Co.* v. *Adolph Coors Company, supra*, 112 Cal. Rptr. at 593.

GAC points to no "direct and positive" conflict between state and federal antitrust laws in general, or as the state law has been applied in this case. However, it suggests that if state antitrust laws are applied to interstate commerce of the nature involved in this case, "intolerable burdens" would be imposed on that commerce because of "differing limitations upon competition in each jurisdiction where goods might be produced, transported or sold."

In *Exxon* v. *Governor of Maryland*, *supra*, the Supreme Court rejected a similar argument, stating that the existence of such potential conflicts is " 'entirely too speculative' . . . to warrant preemption." 437 U.S. at 131. The Court went on to say that it is not only "generally reluctant to infer pre-emption," but also, that it would be "particularly inappropriate to do so" where "the basic purposes" of the state and federal statutes are similar. *Id.* at 132.

The basic purposes of the state and federal antitrust laws in question here are not merely similar; they are identical—"to establish a 'public policy of first magnitude;' that is, promoting the national interest in a competitive economy." *United Nuclear Corp.* v. *General Atomic Co.*, *supra*, 93 N.M. at 125, 597 P.2d at 310 (citation omitted). *See also* J. Flynn, *supra*, at 138. The state act in question uses substantially the same language as the Sherman Act. J. Flynn, *supra*, at 139. The state act has been applied consistently with federal actions regarding the cartel and Gulf's role therein. *See* n. 50, *supra*, and accompanying text. There is thus no "clash of competing fundamental policies." *United Nuclear Corp.* v. *General Atomic Co.*, *supra*, 93 N.M. at 125, 597 P.2d at 310.

GAC suggests that even in the absence of "direct and positive" conflicts between state and federal antitrust laws, the dominate federal interest in foreign commerce

precludes application of state antitrust laws to cartel activities. However, we are not interested in this case in regulating foreign commerce; we are concerned with practices that allegedly were aimed at restraining trade in this State. Without full cartel disclosure, we cannot determine what commerce the cartel's activities extended to. We will not cast aside laws designed to protect the trade of this State without the necessary factual predicate upon which to base a finding that they have been preempted by federal law, particularly where the bad faith conduct of the party charged with violations of those laws has been found to be largely responsible for the missing factual material. *See* Section III, *infra.*

GAC also argues that the dominate federal interest in energy matters warrants a finding that state antitrust laws are premepted insofar as they may be applied to anti-competitive practices in the field of energy. However, the concept of preemption based on federal dominance of a subject matter rests on the likelihood that state regulations in the area will interfere with the federal purposes. *See City of Burbank* v. *Lockheed Air Terminal, supra*; *Head* v. *New Mexico Board*, 374 U.S. 424, 429-30 (1963). The promotion of anti-competitive trade practices in uranium marketing is not part of any federal energy program. *See* n. 50, *supra*, and accompanying text, and n. 64, *supra.* Thus, the prevention of such practices by the states poses no significant possibility of conflict with federal policy.

Therefore, we find no basis upon which to hold that the New Mexico antitrust laws, as applied to the contracts for the sale of uranium at issue in this case, have been preempted by the federal antitrust laws.

3. *Scope of the New Mexico Antitrust Act*

GAC's third argument as to the inapplicability of the New Mexico Antitrust Act is that the Act only applies

to contracts which are illegal on their face. GAC contends that ordinary purchase and sale contracts—such as the Supply Agreements at issue here—which are fair and enforceable on their face, are valid even if they are related in some peripheral way to an antitrust violation.

GAC relies on *State* v. *Electric City Supply Company*, 74 N.M. 295, 393 P.2d 325 (1964) and *Kelly* v. *Kosuga*, 358 U.S. 516 (1959). We find both cases distinguishable from this case. First, unlike the Sherman Antitrust Act at issue in *Kelly* v. *Kosuga*, the New Mexico Act *does* contain an explicit provision voiding contracts which have as their object or operate to restrict or monopolize any part of the trade or commerce of New Mexico. Section 57-1-3, N.M.S.A. 1978 (current version at § 57-1-3, N.M.S.A. 1978 (1979 Supp.)) states:

> All contracts and agreements in violation of the foregoing two sections [57-1-1, 57-1-2 NMSA 1978] shall be void, and the person or persons, corporation or corporations, association or associations who shall violate the provisions of either of said sections shall be civilly liable to the party injured for any and all damage occasioned by such violation, and any purchaser of any commodity from any individual, corporation or association transacting business in violation of such section shall not be liable for the payment for such commodity.

By recognizing the defense of contract illegality in this case, we are, rather than creating a new remedy, merely giving effect to the express provisions of the antitrust laws of this State.[73]

Second, in both *Kelly* v. *Kosuga* and *Electric City Supply Company*, the contracts sued upon had been fully

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[73] Because the New Mexico Antitrust Act "does not provide for treble damages as available to federal litigants, the ability to have a contract declared void is the most effective tool provided by New Mexico law." Weschler, 9 N.M.L. Rev. at 9, n. 70.

performed, and the courts refused to permit one party to avoid its obligation to pay for the goods it received.[74] Thus, in those cases the courts furthered the general policy, as Justice Holmes put it "of preventing people from getting other people's property for nothing when they purport to be buying it." *Continental Wall Paper Co.* v. *Lewis* [sic] *Voight & Sons Co.*, 212 U.S. 227, 271 (1909) (dissenting). *See Kelly* v. *Kosuga*, 358 U.S. at 520-21. This policy controlled the *Kelly* case. *See Viacom Intern. Inc.* v. *Tandeum Productions, Inc.*, 526 F.2d 593, 599 (2nd Cir. 1975); Comment, "The Defense of Antitrust Illegality in Contract Actions," 27 U. Chi. L. Rev. 758, 769 (1960).

No such policy is involved here, for United is not seeking to avoid its obligation to deliver the uranium and yet at the same time recover the contract price for it. In the case of executory contracts, such as those at issue here, the policy of avoiding the unjust enrichment which would result from recognition of an antitrust defense simply is not relevant. *See* 27 U. Chi. L. Rev. at 769-71; Lockhart, "Violation of the Antitrust Laws as a Defense in Civil Actions," 31 Minn. L. Rev. 507, 573 (1947). *Compare Atlantic Richfield Co.* v. *Malco Petroleum, Inc.*, 471 F.2d 1258, 1260-61 (6th Cir. 1972) *with Associated Press* v. *Taft-Ingalls Corporation*, 340 F.2d 753, 769 (6th Cir. 1965), *cert. denied*, 382 U.S. 820 (1965).

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[74] In *Electric City Supply Company*, the contract sued upon was not even alleged to have violated the antitrust laws. There, a contractor sold equipment to a municipality which he had purchased from a materialman. After the contractor was paid by the city, he sought to avoid his obligation to pay the materialman on the ground that his contract *with the municipality* violated state and federal antitrust laws. The materialman was not a party to that contract. Thus, since the contractor had been fully paid by the city, this Court refused to permit him to avoid his obligation to pay the materialman.

Third, the Supply Agreements at issue here are alleged to be one of the means by which GAC and Gulf sought to monopolize the uranium market of the United States. If proven, United's allegations would establish that the Supply Agreements, rather than being collateral to or independent of the alleged monopolistic conspiracy, were essential parts of a general plan or scheme which the law condemns. *Compare Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540, 546-49 (1902) *with Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, *supra*, 212 U.S. at 258-62 (1909). Under such circumstances, the refusal to recognize an antitrust defense would place the court in the position of "enforcing the precise conduct made unlawful by the [antitrust laws]." *Kelly* v. *Kosuga*, 358 U.S. at 520. It would be contrary to the public policy of this State to enforce a sale which was in execution or aid of an illegal price-fixing, anti-competitive, monopolistic conspiracy where recovery would aid the alleged law violator to accomplish the very purpose of his illegal agreement.

Finally, we do not read the words in *Electric City Supply Company* that the contract sued on must "itself be tainted with the illegality" to mean that the contract must overtly call for some illegal act on its face before the antitrust laws can provide a defense. To the extent that that decision can be so construed, it is inconsistent with the language of Section 57-1-3. *See generally Bruce's Juices* v. *Amer. Can. Co.*, 330 U.S. 743, 763-64 (1947) (Murphy, J., dissenting); 31 Minn. L. Rev. at 547, n. 211.[75]

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[75] A similar argument was rejected in the unreported decision of *General Atomic Company* v. *Exxon Nuclear Company, Inc.*, (No. 78-223E) (S.D. Cal., Sept. 6, 1978). Like United here, Exxon sought to have its obligation to supply uranium to GAC declared invalid. The court held that a contract need not call for some overtly illegal act on its face before performance of it is enjoined. The court concluded that it would be enough if it was proved that GAC's contract with Exxon "would have the effect of securing to GAC monopoly control of the relevant uranium market."

Based on the foregoing reasons, we find that the contracts at issue and United's antitrust allegations are within the scope of the New Mexico Antitrust Act.

III.

GAC'S NONCOMPLIANCE WITH DISCOVERY ORDERS AND THE DISCOVERY SANCTIONS IMPOSED FOR NONCOMPLIANCE

In this section of the opinion we examine GAC's conduct in the discovery process, and analyze both the discovery sanctions and the means by which they were imposed. In light of the complex and lengthy proceedings which led to that judgment, an extensive and detailed examination of the questions presented is imperative. They will be analyzed in the following order:

1. Whether GAC was guilty of a willful failure to comply with the rules of discovery and the discovery orders of the court.
2. Whether findings of willful noncompliance could be made without a hearing.
3. Whether the sanctions entered for such noncompliance were appropriate.

The trial court's sanctions order and default judgment of March 2, 1978 was entered under Rule 37(b)(2)(iii), which provides that if a party or an officer or managing agent of a party refuses to obey an order issued under Rule 37(a) to answer interrogatories, or an order made under Rule 34 to produce documents,

> the court may make such orders in regard to the refusal as are just, and among others the following:
>
> . . . .
>
> (iii) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or

> proceeding or any part thereof, *or rendering a judgment by default against the disobedient party*[.] (Emphasis added.)

The case law in New Mexico is not clear as to whether Rule 37(b)(2) is applicable only to a willful or bad faith refusal to obey orders entered under Rules 37(a) and 34. *Compare Rio Grande Gas Company* v. *Gilbert*, 83 N.M. 274, 276-78, 491 P.2d 162, 164-66 (1971) *with Pizza Hut of Sante Fe, Inc.* v. *Branch*, 89 N.M. 325, 326-27, 552 P.2d 227, 228-29 (Ct. App. 1976). We agree with the approach of the United States Supreme Court in *Societe Internationale* v. *Rogers*, *supra*, 357 U.S. at 208-12, where, in construing identical language in Rule 37 of the Federal Rules of Civil Procedure, the Court stated:

> For purposes of subdivision (b)(2) of Rule 37, we think that a party "refuses to obey" simply by failing to comply with an order. So construed the Rule allows the court all the flexibility it might need in framing an order appropriate to a particular situation. Whatever its reasons, petitioner did not comply with the production order. Such reasons, and the willfulness or good faith of petitioner, can hardly affect the fact of noncompliance and are relevant only to the path which the District Court might follow in dealing with petitioner's failure to comply.

Id. at 208. Thus, Rule 37(b)(2) applies to *any* failure to comply with discovery orders of the type specified therein. However, the sanctions provided by Rule 37(b)(2)(iii), entailing the denial of an opportunity for a hearing on the merits, may only be imposed when the failure to comply is due to the willfulness, bad faith or fault of the disobedient party. *See Societe Internationale* v. *Rogers*, *supra*, 357 U.S. at 212.[76]

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[76] Because both *Rio Grande Gas Company* v. *Gilbert*, *supra*, and *Pizza Hut of Santa Fe, Inc.* v. *Branch*, *supra*, involved such aanc-

We have previously adopted the following test of willfulness:

> [A] willful violation of a provision of a statute or regulation is any conscious or intentional failure to comply therewith, as distinguished from accidental or involuntary non-compliance, and . . . no wrongful intent need be shown to make such a failure willful. (Citations omitted.)

Rio Grande Gas Company v. *Gilbert*, *supra* at 278, 491 P.2d at 166, quoting from *Brookdale Mill* v. *Rowley*, 218 F.2d 728, 729 (6th Cir. 1954).

The trial court in this case made the requisite finding that GAC's discovery failures were willful. It was based on forty-eight recitals, in which the court described GAC's discovery failures in detail. The court concluded:

> [T]he defendant, General Atomic Company, has followed a conscious, willful and deliberate policy throughout this litigation, which continues to the present time, in cynical disregard and disdain of the Rules of Procedure relating to discovery and this Court's discovery Orders, of concealing rather than in good faith revealing the true facts concerning the international uranium cartel in which Gulf Oil Corporation was involved and which through its subsidiaries, officers, agents and affiliates, including defendant, GAC, participated . . .; the aforesaid policy of defendant, GAC, of hiding that information from the Court and opposing counsel, and in consequence thereof, the exercise of the utmost bad faith in all stages of the discovery process up to the present time,

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tions, the requirement of a willful refusal they applied is consistent with the approach we take here. *Kalosha* v. *Novick*, 77 N.M. 627, 426 P.2d 598 (1967), is also consistent with the distinction we make based on *Societe Internationale* v. *Rogers*, *supra*, because *Kalosha* involved Rule 37(d), which, unlike Rule 37(b)(2), expressly requires a showing of willfulness.

> leads the Court to the inescapable conclusion that at this late date, the Court's discovery Orders will not be complied with by the defendant, GAC, and that this Court is powerless to secure unto all parties to this case either due process of law or a fair trial based upon equality and parity of right and duty unless sanctions under Rule 37 are imposed by the Court at this time.

The scope of review on appeal from such a judgment is

> "to consider the full record" as well as the reasons assigned by the Trial Court for its judgment, and to reverse the judgment below, if after such review, the appellate court " 'has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.' "

Wilson v. *Volkswagen of America, Inc., supra,* 561 F.2d at 506 (footnote omitted), quoting from *Finley* v. *Parvin/Dohrmann Company, Inc.,* 520 F.2d 386, 390 (2nd Cir. 1975). *See also Anderson* v. *Air West, Inc.,* 542 F.2d 522, 524 (9th Cir. 1976). Where the judgment involves the sanctions provided by Rule 37(b)(2)(iii),

> an appellate court's review should be particularly scrupulous lest the district court too lightly resort to this extreme sanction, amounting to judgment against the defendant without an opportunity to be heard on the merits.

Emerick v. *Fenick Industries, Inc.,* 539 F.2d 1379, 1381 (5th Cir. 1976). In making this determination, we must consider the entire record,[77] and "the totality of circumstances surrounding the failure to make discovery." [78]

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[77] *See In Re Liquid Carbonic Truck Drivers Chemical, Etc.,* 580 F.2d 819, 823 (5th Cir. 1978), *cert. denied,* 441 U.S. 945 (1979); *Affanato* v. *Merrill Bros.,* 547 F.2d 138, 140 (1st Cir. 1977).

[78] *Trans World Airlines, Inc.* v. *Hughes,* 449 F.2d 51, 57 (2nd Cir. 1971), *rev'd on other grounds,* 409 U.S. 363 (1973).

Before turning to that task, we consider GAC's argument that the judgment is defective because the trial court adopted almost verbatim the proposed recitals submitted by United. The practice of verbatim adoption of proposed findings is not desirable, but it may be acceptable in some instances. *See United Nuclear Corp.* v. *General Atomic Co., supra*, 93 N.M. at 122, 597 P.2d at 307. Such findings "are not to be rejected out-of-hand." *United States* v. *El Paso Gas Co.*, 376 U.S. 651, 656 (1964).

> The ultimate test as to the adequacy of findings will always be whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision, and whether they are supported by the evidence.

Schilling v. *Schwitzer-Cummins Co.*, 79 U.S. App. D.C. 20, 142 F.2d 82, 84 (D.C. Cir. 1944) (footnotes omitted). *See also United Nuclear Corp.* v. *General Atomic Co., supra*, 93 N.M. at 122, 597 P.2d at 307.

The verbatim adoption of proposed findings requires the appellate court to "view the challenged findings and the record as a whole with a more critical eye to insure that the trial court has adequately performed its judicial function." *Ramey Const. Co., Inc.* v. *Apache Tribe, Etc.*, 616 F.2d 464, 467 (10th Cir. 1980) (citations omitted). *See also In Re Las Colinas, Inc.*, 426 F.2d 1005, 1010 (1st Cir. 1970). This we have done.

GAC did not challenge thirteen of the forty-five recitals of United which the trial court adopted. At least seven others are narrative descriptions of the proceedings which, although challenged by GAC, are uncontradicted by any evidence. Many of the recitals merely described actions the trial court had previously taken or statements it had made in open court; several reiterated rulings the court had made over the course of the preceding two years of proceedings. All of the matters recited were within the personal knowledge of the trial court, and most

concerned matters that had been argued before the court in previous hearings. In light of these factors and our conclusion that the findings of bad faith are amply supported by the record, it was not reversible error to adopt the proposed findings of United. *United Nuclear Corp.* v. *General Atomic Co., supra,* 93 N.M. at 122, 597 P.2d at 307.

A.

GAC WILLFULLY FAILED TO COMPLY WITH THE COURT'S DISCOVERY ORDERS AND THE RULES OF DISCOVERY

As found by the trial court, GAC's bad faith in discovery consisted of four categories of misconduct: (1) Its responses to the First Set of Interrogatories; (2) its responses to the Second Set of Interrogatories; (3) its failure to produce Canadian cartel documents; and (4) its conduct regarding the production of the so-called "Grand Jury Documents" and "Snyder Documents." The first area will be examined in the following section. The remaining three areas, which cover events that transpired in the final year of the proceedings in the trial court, will be examined together in a second section.

1. *The First Set of Interrogatories*

a. *The Trial Court's Recitals on the First Set of Interrogatories*

The following is a summary of the contested recitals of the trial court regarding GAC's responses to the First Set of Interrogatories:

> 1. The definition section and certain questions of those interrogatories (including questions 30-34 and 69) specifically requested information from the constituent partners of GAC. Neither the definitions

nor the questions were objected to within the time provided by Rule 33.

2. Gulf was obligated by the terms of the parties' agreement of March 12, 1976 to produce its relevant business records.

3. Cartel documents were subject to production under the First Set of Interrogatories and the March 12 agreement.

4. No law of Canada prohibited the production of cartel documents as of March 1976.

5. GAC's first answers to the interrogatories were "wholly inadequate and evasive," in part, because of the failure to include information on the cartel.

6. GAC agreed in its answer to interrogatory number 69 to produce the business records of Gulf and Scallop.

7. From March 12, 1976, GAC neither identified nor produced cartel documents or information in the possession of Gulf despite its agreement to do so and the court's order of April 30, 1976 that it comply with that agreement.

8. From December 31, 1975 through September 23, 1976—the date of the promulgation of the Canadian Uranium Information Security Regulations—GAC informed neither United nor the trial court about the existence of the cartel, Gulf's participation therein, or about Gulf cartel documents in Canada.

9. A good faith, non-evasive answer to the First Set of Interrogatories would have, in whole or in part, eliminated the necessity for the Second Set of Interrogatories.

10. Cartel documents and records were clearly within the ambit and requirement of a good faith compliance with United's initial discovery demands,

and subsequent demands made prior to September 23, 1976.

11. GAC was in default and violation of its obligation to produce cartel documents prior to September 23, 1976.

Before analyzing these recitals, we detail the history of the portion of the proceedings they cover.

b. *The Proceedings Through April 1977*

On December 31, 1975, United filed its complaint in Sante Fe District Court. On the same day it received leave of the court pursuant to Rule 33 to serve interrogatories on GAC. This, the First Set of Interrogatories, was virtually identical to a set served in September 1975 in the previous action.[79] Certain portions of these interrogatories, which later became a key issue in the case, are set forth below.[80] Although the interrogatories did not

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[79] See n. 2, *supra*. Answers to the interrogatories never became due in the earlier action, and none were ever filed.

[80] The interrogatories contain the following definitions:

B. "Gulf" means Gulf Oil Corporation *and person(s)*, as hereafter defined.

. . . .

D. "General Atomic" means General Atomic Company, a partnership, *its general partners Gulf and Scallop*, and all person(s) as hereafter defined.

. . . .

F. "Person(s)" means all entities, including, without limiting the generality of the foregoing, all individuals, any and *all business entities, associations, partnerships, limited partnerships, joint ventures or corporations which are owned or controlled by or which are under common control of any corporation* and any person acting on behalf of any of the entities described in this definition. (Emphasis added.)

The interrogatories which are of particular importance to the issues on this appeal are the following:

specifically refer to the cartel, the definitions and interrogatories were extremely broad. The definitions defined GAC as including "a partnership [and] its general partners." In addition to Interrogatories 30 through 34, numerous other interrogatories called for information from the "partnership and the partners."

Although GAC's counsel stated in October 1976, that the interrogatories were "in the broadest form that I have ever seen in my years of practice"; although GAC

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30. Identify all properties owned or *controlled by the partnership or the partners* directly or indirectly for the exploration, development or mining of uranium bearing ore.

31. Identify all licenses, permits, leases and agreements and all past and pending, contemplated negotiations *of the partnership or the partners* directly or indirectly pertaining to the exploration, development, mining and milling of uranium bearing ores.

32. Identify all agreements and all past, pending or contemplated negotiations *of the partnership or the partners* directly or indirectly pertaining to the processing of uranium bearing ores into U_3O_8 the conversion thereof into UF_6 or any other form and the marketing and sale of all such uranium bearing products.

33. Identify all agreements and all past, pending and contemplated negotiations *of the partnership or the partners* directly or indirectly pertaining to the acquisition of uranium in any form.

34. Identify all studies, evaluations, projections and other data pertaining to uranium ore reserves, the mining and milling thereof, the further processing and conversion of uranium and the marketing and sale of all such uranium products.

. . . .

69. Specify a date and place where counsel for Plaintiff may examine and reproduce the relevant business records *of the partnership or the partners* and each of them and those records of GUNFC [Gulf-United] *in the custody of the partnership or the partners.* (Emphasis added.)

was to concede almost two years later that "interrogatories 32, 33 and 34 relate to every conceivable relationship of uranium to the partnership or the partners"; and although GAC now objects on appeal to these interrogatories as being "literally limitless" in scope—GAC did not timely object to their vagueness, to their breadth, or to the fact that they called for information from the partners.

Three days after the time for filing objections had passed, Gulf and GAC held a litigation strategy meeting in San Diego. Notes of that meeting, which were inadvertently produced to United in this case, reflect a discussion on the topic of "how to reduce discovery by Bigbee [United's counsel].[81]

On the day before answers to the interrogatories were due under Rule 33, GAC sought and received an extension until February 23, 1976, to answer or otherwise plead to the complaint and to answer the interrogatories. The court also extended the time for filing objections to the interrogatories, even though it had already expired.

On February 23, GAC moved to dismiss the case for lack of personal jurisdiction. It also moved for a protective order under Rules 33 and 30(b) to stay its obligation to answer the interrogatories until the motion to dismiss was disposed of.[82] United refused to consent to the protective order, and GAC did not secure an order based on its motion. The time for filing answers or objections to the interrogatories passed. On March 10,

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[81] The notes also reflect that the idea of filing a motion to disqualify United's counsel was discussed and rejected. However, the motion was filed fourteen months later. *See* Section IV, *infra*, especially n. 152, *infra*. *See also* n. 32, *supra*.

[82] Rule 30(b) provides for protective orders from the taking of depositions. Rule 33 provides that the provisions of Rule 30(b) apply to interrogatories as well.

1976, United filed its first application for a default judgment under Rule 37(d), alleging that GAC had "wilfully failed to answer interrogatories."

GAC now seeks to excuse its failure to comply with the February 23 deadline on two bases: First, it had filed the motion for a protective order on that date; and second, on March 4, 1976, United's counsel agreed that answers would not have to be filed while motions were pending.[83]

Motions for protective orders under Rule 30(b) "do not have the effect of automatically accomplishing what is sought therein." *Wieneke* v. *Chalmers*, 73 N.M. 8, 14, 385 P.2d 65, 69 (1963). GAC's position was aptly described in *Pioche Mines Consolidated, Inc.* v. *Dolman*, 333 F.2d 257, 269 (9th Cir. 1964), *cert. denied*, 380 U.S. 956 (1965):

> Counsel's view seems to be that a party need not appear if a motion under Rule 30(b), F.R. Civ.P. is on file, even though it has not been acted upon. Any such rule would be an intolerable clog upon the discovery process. Rule 30(b) places the burden on the proposed deponent to get an order, not just to make a motion. And if there is not time to have his motion heard, the least that he can be expected to do is to get an order postponing the time of the deposition until his motion can be heard. . . . But unless he has obtained a court order that postpones or dispenses with his duty to appear, that duty remains. Otherwise, . . . a proposed deponent, by merely filing motions under Rule 30(b), could evade giving his deposition indefinitely. Under the Rules,

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[83] GAC originally contended that on February 13, 1976, United had agreed that answers to the interrogatories did not have to be filed on February 23. At a hearing on October 1, 1976, GAC conceded that although a proposal to that effect was discussed, no such agreement was ever reached.

> it is for the court, not the deponent or his counsel, to relieve him of the duty to appear.

See also Twardzik v. *Sepauley*, 286 F.Supp. 346, 350 (E.D. Pa. 1968) ("we criticize the filing of a motion for a protective order on the very day on which the depositions were scheduled"); *Jefferson* v. *Greater Anchorage Area Borough*, 451 P.2d 730, 734 (Alaska 1969).

The alleged agreement between counsel of March 4, 1976, is largely irrelevant since GAC was not defaulted on the basis of this original failure to answer. In any event, any agreement reached on that date to relieve GAC of its obligation to answer the interrogatories does not alter the fact that ten days *earlier* GAC had failed to meet a deadline set by the court.

United's first motion for a default judgment was not acted upon by the court because the parties signed a written agreement on March 12, 1976, whereby United agreed to withdraw its motion for a default judgment. GAC in turn agreed to "answer in good faith" the interrogatories. Counsel for Gulf also signed the agreement, consenting to an extension of time within which United could answer or otherwise plead to a federal declaratory judgment action Gulf had filed against it the previous month.[84] The agreement provided that documents called for by the interrogatories would be produced at GAC's San Diego headquarters instead of being

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[84] On January 19, 1976, GAC filed an interpleader action against United, and on the following day, Gulf filed the declaratory judgment action. Both actions were dismissed for lack of subject matter jurisdiction, and appeals were taken from the dismissals. Dismissal of the first action was affirmed. *General Atomic Co.* v. *Duke Power Co.*, 553 F.2d 53 (10th Cir. 1977). The appeal in the second case was abandoned. *Gulf Oil Corp.* v. *United Nuclear Corp.*, Civ. No. 76-032-B (D.N.M. 1976). In neither case did GAC or Gulf seek arbitration or the disqualification of United's counsel. *See* n. 152, *infra*.

supplied with the answers, but it made no mention of the fact that the interrogatories specifically requested information from the partners. The agreement specified that if claims of privilege were to be made as to any documents, the grounds for such privilege would be "set forth in the answers to Interrogatories." One section of the agreement stated that certain documents could be only generally identified. It gave as an example "two boxes of correspondence relating to miscellaneous Gulf activities." On the basis of this language, the trial court ultimately found that Gulf had expressly agreed to produce its relevant documents.

On April 5, 1976, GAC filed its first set of answers to the First Set of Interrogatories. The trial court ultimately found these answers to be "wholly inadequate and evasive," because, for the most part, information concerning the uranium business activities of the individual partners was not provided, and no mention of the cartel was made. The answers did not, as specified in the March 12 agreement of the parties, set forth the grounds for any claims of privilege as to unproduced documents. The answers also did not contain objections to any of the interrogatories or definitions.[85]

Despite its agreement to answer the interrogatories in good faith and its promise to produce documents in June, GAC filed a motion on April 16, 1976 to stay all proceedings, including discovery, pending the outcome on appeal of GAC's challenge to the court's jurisdiction. The trial court granted GAC's motion as to any new

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[85] Indeed, GAC answered Interrogatory 69, which asked for a date and place where United could examine "the relevant business records of the partnership *or the partners and each of them* and those records of GUNFC [Gulf-United] in the custody of the partnership *or the partners*" (emphasis added), as follows:

> *Answer No. 69.* June 20, 1976, General Atomic Company, San Diego, California.

discovery by either party. However, the court held that since GAC had agreed to answer United's interrogatories and to produce documents responsive to the interrogatories, it was bound by that agreement. United warned that it would file a motion for sanctions "if we do not get the documents and if . . . there has been a failure to make the discovery agreed to."

As scheduled, document discovery began at San Diego. It continued through the first week of August. It resumed in mid-September and finally ended in mid-October. During this period of discovery, several million pages of documents were made available to United, who copied almost two hundred thousand pages. GAC argues that the number of documents it produced during that summer refutes any notion that it was acting in bad faith, but neither cartel documents nor any other documents which were then in the custody of the individual partners were produced. The quantity of material produced does not relieve a party of the obligation to produce what is requested.

In August 1976, United filed its second application for a default judgment, alleging that GAC had failed to comply with the March 12 agreement, had filed answers to the interrogatories which were "so evasive and unresponsive . . . as to constitute a failure to answer," and had failed to properly make claims of privilege as contemplated by the agreement. However, neither this application nor the briefs in support of it mentioned GAC's failure to produce documents in the custody of the partners, or specifically, the failure to produce cartel records.

A hearing on the application for a default judgment was set for October 1, 1976. One week before the hearing, the Canadian Government promulgated the Uranium Information Security Regulations. The Regulations generally prohibit the release of information contained in documents located in Canada concerning discussions tak-

ing place between January 1, 1972 and December 31, 1975 relating to various aspects of the uranium business. *See* n. 41, *supra*. The Regulations were adopted for the express purpose of preventing the production of cartel-related information in American courts.[86]

Two days before the October 1 hearing, in a memorandum filed in support of its second application for a default judgment, for the first time, United specifically pointed out that GAC had failed to produce documents in the possession or custody of the individual partners, Gulf and Scallop, as required by the First Set of Interrogatories.

On October 26, 1976, GAC for the first time informed the court that it did not consider itself obligated to supply documents "held individually" by the partners. GAC also argued:

> Whether or not the answers to the interrogatories are true or false involves the ultimate issues of fact in this case. . . . The correctness of defendant's answers to interrogatories is not within the scope of the issues to be determined at this hearing. . . .
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> . . . .
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> . . . [T]he issue in question . . . is whether or not defendant wilfully failed to answer the interrogatories. The issue is not whether defendant's answers are factually correct.

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[86] There is no evidence that Gulf or GAC played any role in securing the adoption of the Regulations. To the contrary, the Canadian Government has stated: "These Regulations were not procured by members of the uranium industry. . . ." However, that Government has said that the Regulations were promulgated "when it became clear that documents located in Canada bearing on the [cartel] might be removed to the United States in response to proceedings there." The Canadian Government's immediate concern was apparently several cases involving Westinghouse. *See* n. 88, *infra*.

This is not a correct statement of the law.[87]

On November 30, 1976, the trial court denied United's second application for a default judgment. But the court stated that the denial was without prejudice to the plaintiff's right to apply to the court to compel "full, detailed and complete discovery responses," or "for appropriate sanctions for the failure of the defendant partnership *or either partner thereof* to comply with specific orders of the Court directing discovery." (Emphasis added.) The court held that the right to discovery "exists against . . . a party partnership *and the individual partners comprising the partnership*, and the agents, servants, employees, directors and officers of a party *or partner*," (Emphasis added.)

United then moved to compel further answers to the First Set of Interrogatories and for the production of documents from GAC and the individual partners. GAC responded by contending that it had "no obligation or ability" to furnish documents in the possession of the partners, a point decided against GAC in the November 30 order. GAC's statement that it had "no ability" to produce partner documents was false, since less than four months later it began to produce those records.

In early January 1977, the court set a deadline of July 1, 1977 for the completion of all discovery, to which GAC made no objection. The court granted United's

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[87] *Cf. Evanson* v. *Union Oil Co. of California*, 85 F.R.D. 274, 277 (D. Minn. 1979) ("Giving a false answer [to an interrogatory] is itself sufficient evidence of bad faith"); *Hunter* v. *International Systems & Controls Corp.*, 56 F.R.D. 617, 631 (W.D. Mo. 1972) ("Parties like witnesses are required to state the truth, the whole truth and nothing but the truth in answering written interrogatories"); *Buehler* v. *Whalen*, 70 Ill. 2d 51, 374 N.E.2d 460, 467 (1977) ("[W]e cannot condemn too severely the conduct of the [defendant]. . . . It gave false answers to interrogatories under oath"). *See also Life Music, Inc.* v. *Broadcast Music, Inc.*, 41 F.R.D. 16, 24 (S.D. N.Y. 1966).

motion for supplemental answers to its First Set of Interrogatories and for the production of partner documents. It set a deadline of April 15, 1977 for the filing of the answers, stating that it expected "a good faith answer . . ., a complete answer, a non-evasive answer."

GAC informed the court that none of Gulf's or Scallop's documents had been reviewed, although the court had held on two previous occasions that the partners were subject to discovery. The court reaffirmed that ruling at two other hearings in January 1977.

GAC then informed the court that

> there are some problems that Gulf has in getting materials from Canada because there are some regulations and statutes that forbid transportation to the United States. There are a lot of problems that would be involved in some of the Gulf documents. . . .

The court ordered GAC to make "specific objections." However, GAC did not at that time inform the court of the Uranium Information Security Regulations promulgated almost four months earlier.

At another hearing in January, GAC argued that even if the court could order production of "partnership related" documents in the possession of the partners, it could not require the partners to produce "non-partnership" documents. The trial court rejected this distinction. Although GAC's counsel told the judge, "I understand your position," GAC raised the very same objection one month later.

In February 1977, United moved to compel the production of documents Gulf had produced in cartel-related litigation in Pennsylvania (the Duquesne documents),[88]

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[88] *Duquesne Light Co., et al.* v. *Westinghouse Electric Corporation*, (No. G.D. 75-23978) (Pa. Ct. Comm. Pleas. 1975). This was one of several cases brought by utility companies against Westing-

and to the federal grand jury in Washington, D.C. (the Grand Jury documents), which was then investigating Gulf's participation in the cartel. In response, GAC reargued the issue of the production of "non-partnership documents," and for the first time suggested that the production of such materials would require the disqualification of United's counsel. Again GAC alluded to "a serious legal problem with respect to the partnership's ability to produce foreign documents," but it did not elaborate on this point. A week later, GAC finally raised the Uranium Information Security Regulations and the Ontario Business Records Protection Act as a bar to the production of Gulf Canada's records. However, it said nothing about the fact that those records included information on the cartel.

United's motions to compel the production of the Grand Jury and Duquesne documents were heard on March 7, 1977. Again GAC reargued the question of the production of the partners' "non-partnership documents." It informed the court that it was producing the first of Gulf's records that very day, despite at least four prior orders of the court that the partners were subject to discovery, and despite an earlier court order that production of the partners' documents begin on January 24, 1977 and proceed "diligently and . . . continuously" thereafter.

At the end of the March 7 hearing, the court granted United's motions for the production of the Duquesne and Grand Jury cartel documents, stating that they were "already covered" by its previous orders. The court again held that any specific documents subject to "good faith" claims of relevancy or privilege had to be made in ac-

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house for the delivery of uranium. Westinghouse defended by alleging that its obligations had been rendered commercially impracticable, in part because of the actions of the cartel. *See also In Re Westinghouse Electric Corporation Uranium Contracts Litigation* (M.D.L. 235) (E.D. Va.).

cordance with its prior orders. Again the court insisted that "there be full and honest, good faith discovery available to all parties." And he warned:

> If that is not done, I assume that some party is going to file a motion for a default judgment, and . . . if I become convinced that there has been any, any invasion of good faith discovery, I would certainly look long and hard at a Motion for Default Judgment. . . .

Eleven days later, GAC finally moved to disqualify United's counsel. *See* Section IV, *infra.*

On April 15, 1977, GAC filed approximately five thousand pages of supplemental answers to the First Set of Interrogatories. However, not a single word was said of the cartel or Gulf's role in it, nor was there any claim that cartel documents were privileged, irrelevant, or protected from disclosure by Canadian law. GAC did file objections to I&M's request for the production of depositions of Gulf cartel participants which had been taken in the *Duquesne* litigation, and any exhibits attached thereto. GAC stated that production of this material, which was located in the United States, "would be violative of Canadian law," despite the fact that six weeks earlier it had informed the trial court that Canadian nondisclosure laws did not apply to documents in the United States. Twelve days later, GAC withdrew these objections.

It is in the context of the foregoing chronology of events that we examine the recitals of the trial court concerning GAC's answers to United's First Set of Interrogatories.

c. *Analysis of the Recitals on the First Set of Interrogatories*

We hold that each of the recitals of the trial court is supported by the record.

The fact that the interrogatories called for information from the constituent partners of GAC is apparent from the plain meaning of the words in which they were written. *See* n. 80, *supra.* GAC did not object to this language, either within the time provided by Rule 33 (January 10, 1976), or within the extension of time granted by the trial court for the filing of objections (February 23, 1976).

The law is well established that the failure to timely file objections to interrogatories operates as a waiver of any objections the party might have.[89] This rule is generally applicable "[r]egardless of how outrageous or how embarrassing the questions may be."[90] When a party fails to file timely objections, the only defense that it has remaining to it is that it gave a sufficient answer to the interrogatories.[91]

GAC's first answers to the interrogatories almost totally failed to include information concerning the uranium

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[89] *Monogram Models, Inc.* v. *Industro Motive Corporation,* 492 F.2d 1281, 1287 (6th Cir. 1974); *Perry* v. *Golub,* 74 F.R.D. 360, 363 (N.D. Ala. 1976); *United States* v. *58.16 Acres of Land, Etc., Clinton Cty., Ill.,* 66 F.R.D. 570, 572 (E.D. Ill. 1975); *Harlem River Con. C., Inc.* v. *Associated G. of Harlem, Inc.,* 64 F.R.D. 459, 465 (S.D. N.Y. 1974); *Zatko* v. *Rogers Manufacturing Company,* 37 F.R.D. 29, 33 (N.D. Ohio 1964); *Bohlin* v. *Brass Rail,* 20 F.R.D. 224, 225 (S.D. N.Y. 1957).

[90] *Davis* v. *Romney,* 53 F.R.D. 247, 248 (E.D. Pa. 1971). *Cf. Bollard* v. *Volkswagen of America, Inc.,* 56 F.R.D. 569, 579 (W.D. Mo. 1971) (the "contention of the vagueness of the interrogatories is not credible . . . when defendant . . . did not file any timely objection to the interrogatories on this ground and sought no pretrial conference to submit its contentions") *and Cephas* v. *Busch,* 47 F.R.D. 371, 372-73 (E.D. Pa. 1969) (answers compelled "notwithstanding that much of the information sought is totally irrelevant . . . and notwithstanding that the interrogatories . . . are harrassing and vexatious," and "patently objectionable").

[91] *National Transformer Corporation* v. *France Mfg. Co.,* 9 F.R.D. 606, 607 (N.D. Ohio 1949).

activities of the partners despite the wording of the interrogatories. See n. 80, *supra*. Under the rules, if the interrogatories do not assign a particular meaning to the phrases they contain, the answering party is obligated to answer the interrogatories in "the ordinary, everyday usage and meaning" of the language in which the questions are asked. *Roesberg* v. *Johns-Manville Corp.*, 85 F.R.D. 292, 298 (E.D. Pa. 1980). These interrogatories did not assign a particular meaning to questions calling for information from the partners which would support the limited construction GAC gave to them. Therefore, the trial court was correct in finding those answers to be "wholly inadequate and evasive."

GAC's explanation for this failure is without merit. It contends that because the partners were dropped as parties when the case was refiled on December 31, 1975 (*see* n. 2, *supra*), discovery could only be had from the partnership itself. However, GAC could have attempted to work out the matter with opposing counsel, or failing that, presented its objection to the trial court; it did neither. GAC simply made its own unilateral legal determination of the propriety of the questions asked. It later informed the court that it had "construed the interrogatories to be consistent with the information to which plaintiff was entitled under the rules," which it defined to be only those documents which were in the custody or control of GAC. This practice is universally condemned. *Cf. United States* v. *Board of Trade of the City of Chicago, Inc.*, *supra*, 18 F.R. Serv. 2d at 319 ("The proposition that an adverse litigant may not unilaterally determine the scope of discovery needs no citation"); *Fond Du Lac Plaza, Inc.* v. *Reid*, 47 F.R.D. 221, 222 (E.D. Wis. 1969) ("It is inappropriate for the party to determine on his own that the subject matter of the inquiry is 'premature'; thus, it was the plaintiff's responsibility in this case to answer the interrogatories or to seek relief from the court"). *See also Cohn* v. *Dart*

Industries, Inc. v. *Kavanagh*, 21 F.R. Serv. 2d 792, 794 (D. Mass. 1976). *Armour & Co.* v. *Enenco, Inc.*, 17 F.R. Serv. 2d 514, 517-18 (W.D. Tenn. 1973); *Cardox Corporation* v. *Olin Mathieson Chemical Corp.*, 23 F.R.D. 27, 31 (S.D. Ill. 1958); C. Wright & A. Miller, *Federal Practice and Procedure* § 2173 at 544 (1970 ed.).

GAC's unilateral construction of its discovery obligations constituted bad faith. In *Hunter* v. *International Systems & Controls Corp., supra*, 56 F.R.D. at 622, the court said:

> The refusal to give the information on the ground that the defendant unilaterally and without seeking a ruling of the Court concluded [that the information sought was objectionable] constituted a wilful obstruction of discovery when defendant was possessed of the information (as it now admits). . . . [D]efendant could have objected and sought clarification of its obligation to answer but did not.

The court went on to say, in language applicable to this case:

> [I]t is found that this misconstruction and failure to make discovery was a callous disregard of discovery obligations, and a designing, self-serving unilateral construction of interrogatories 30 and 31. The wording of the interrogatories and answers themselves would not lead to any other reasonable conclusion.

Id. at 625 (footnote omitted). The court concluded:

> [I]t is a dangerous practice which incurs the risk of possible sanctions for a party to limit an interrogatory addressed to it to only a portion of the information which it explicitly requests.

Id. at 631.

The designing, self-serving nature of GAC's construction of the First Set of Interrogatories is particularly

apparent in light of the conflicting representations that GAC later made to the trial court. It represented to the court in December 1976 that it had "no ability" to produce information in the separate possession of its constituent partners; a host of GAC attorneys filed affidavits with the court on March 13, 1978, stating their understanding to be that only information and documents in GAC's possession were subject to production; and GAC argued to this Court that the court below committed error in ordering the production of documents in the possession of the partners. *See* Section II A, *supra*. However, John Ross, the GAC attorney in charge of supervising and coordinating GAC's efforts to provide discovery in response to United's First Set of Interrogatories, stated in an affidavit filed with the court in February 1978:

> Based on the [March 12] discovery agreement, my interpretation of UNC [United] interrogatory number 69 and the history of the case . . . I understood GAC's obligation regarding the production of documents to include . . . [a]ll relevant business records of GUNF [Gulf United], *whether in the custody of GAC, Gulf or Scallop*. . . . (Emphasis added.)

He went on to say that

> [n]o documents in the custody of either Gulf or Scallop were included . . . inasmuch as GAC had concluded that there were no relevant business records of GUNFC [Gulf-United] in the custody of Gulf or Scallop which were not duplicated in the records possessed by GAC.

That determination could not have been made without having examined the records in the custody of the partners.[92]

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[92] In *In Re Folding Carton Antitrust Litigation*, *supra*, 76 F.R.D. at 423-24, the defendant corporation objected to the defini-

Indeed, some information concerning partner operations was contained in GAC's first answers to the interrogatories. For the point made here, it is immaterial that this information concerned only matters relating to the business of Gulf-United or GAC, as GAC has defined that relationship. The fact is that *some* information from the partners was produced, contrary to its disavowal of the availability of such information; to the arguments we rejected in Section II A, *supra*, of this opinion; to the March 1978 representations of its attorneys; and to the October 1976 expression of its understanding of the extent of its obligations. GAC's eventual production of thousands of partner documents demonstrates that such materials were available from the outset.[93] This conduct—which includes contradictory representations and actions and complete reversals of position—is compelling evidence of bad faith and merits the strongest condemnation. *See Diapulse Corporation of America* v. *Curtis Publishing Co.*, 374 F.2d 442, 446 (2nd Cir. 1967); *State of Ohio* v. *Crofters, Inc.*, 75 F.R.D. 12, 24 (D. Colo. 1977), *aff'd sub nom., State of*

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tion of an interrogatory served on it to the extent that it required the production of documents in the custody of its parent corporation. An affidavit was later filed by an officer of the defendant subsidiary, in which he swore that he had searched the files of the parent company to determine the existence of any documents called for by the plaintiffs' discovery requests. He also stated that only certain documents in the parent's files were within the ambit of that request. Based on these statements, the court refused to entertain the defendant's objection that it had no "control" over the parent's records. The situation is almost identical here, except that GAC, unlike the defendant in that case, did not present its objection to the court in a timely fashion.

[93] *Cf. Bollard* v. *Volkswagen of America, Inc., supra*, 56 F.R.D. at 575 (defendant's "later unilateral . . . supplying of partial answers constituted an admission that the original disavowals and claims of unavailability of knowledge were false answers made with knowledge of their falsity." (Citation omitted.)).

Ohio v. *Arthur Andersen & Co.*, 570 F.2d 1370 (10th Cir. 1978), *cert. denied*, 439 U.S. 833 (1978); *Armour & Co.* v. *Enenco, Inc.*, *supra*, 17 F.R. Serv. 2d at 518-19; *Furrenes* v. *Ford Motor Co.*, 79 Wis. 2d 260, 255 N.W. 2d 511, 516 (1977).

GAC argues that it should not be penalized for its unilateral construction of the interrogatories because United did not complain about GAC's failure to provide information from the partners until September 1976. A similar argument was rejected in *Fond Du Lac Plaza, Inc.* v. *Reid*, *supra*, 47 F.R.D. at 222, where the court said:

> [C]ounsel sought to shift the burden to the defendants and require the latter to apply to the court. This is not the format contemplated by the . . . Rules of Civil Procedure. (Citation omitted.)

It was GAC's duty to object to the interrogatories, not United's to object to GAC's failures.

Although some of GAC's answers revealed its interpretation of the requirements of the interrogatories,[94] others contained information from Gulf, and some stated that documents responsive to the questions would be provided later. GAC's answer to Interrogatory 69 is illustrative in that it failed to disclose the limited scope GAC gave to the questions. *See* n. 85, *supra*. The record is uncontradicted that United never represented to either GAC or the court that it did not desire information and documents from the partners. It will not be faulted for

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[94] For example, in answer to Interrogatory 30, which called for the identification of the uranium ore bearing properties of "the partnership or the partners," GAC stated: "Neither of the partners owns or controls any such property for or on behalf of the partnership." United's counsel, of course, knew that Gulf owned massive uranium reserves at Mt. Taylor. *See* Section IV, *infra*.

its patience in waiting for GAC to fully comply with its requests.[95]

The court's recital that Gulf was obligated by the terms of the parties' March 12 agreement to produce its relevant business records is also fully supported. The Ross affidavit makes this point clear, regardless of how one construes the reference in that agreement to "correspondence relating to miscellaneous Gulf activities." Although Ross limited it to the "relevant business records of GUNF [Gulf-United]," the language of the interrogatories and the allegations of the complaint are clearly inconsistent with that limited construction.[96]

The trial court's finding that cartel documents were within the scope of the First Set of Interrogatories is also supported by the record. Interrogatory 32 called for the identification of "all agreements and all past, pending or contemplated negotiations of the partnership or the partners directly or indirectly pertaining to . . . the marketing and sale of all . . . uranium bearing products." A cartel consists of a combination of producers of a product who agree to control the production, sale and price of the product, and to obtain a monopoly in any particular industry or commodity. *Black's Law Dictionary* 270 (4th rev. ed 1968). The uranium cartel consisted of agreements among producers, including Gulf Canada, to set floor prices for and quotas on the market-

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[95] In certain circumstances, a failure to object to insufficient interrogatory answers can constitute a waiver of any right to further answers or sanctions. In *Butler* v. *Pettigrew*, 409 F.2d 1205, 1207 (7th Cir. 1969), the court found such a waiver where the party complaining of insufficient answers failed to seek sanctions until after a trial on the merits and the entry of a judgment thereon. Such extreme circumstances are not present here.

[96] GAC's counsel stated to the court in March 1977 that in United's complaint, "Gulf is the main focal point of the action." *See also* n. 153, *infra*. It could hardly have come as a surprise to GAC then that United sought information from Gulf.

ing of uranium.[97] See n. 102, *infra*. The definitions in the interrogatories clearly encompassed Gulf Canada, for GAC was defined to include Gulf, and Gulf was defined as including "all business entities, associations, partnerships, limited partnerships, joint ventures or corporations" under its control, a category into which its wholly-owned Canadian subsidiary clearly fell.

GAC offers five excuses for its failure to provide cartel information and documents in response to the First Set of Interrogatories: (1) The interrogatories were initially understood to be directed only at GAC; (2) the language of the interrogatories and United's complaint did not either explicitly or implicitly refer to the cartel; (3) the cartel was not raised as an issue until March 1977, and then, only as a legal issue; (4) United knew of the cartel before the complaint was filed; and (5) United's inaction and representations manifested its view that the cartel was not covered by the First Set of Interrogatories.

We have previously rejected the first assertion, but whatever its merit might be as to GAC's original answers, it was no excuse whatsoever for GAC's failure to include information on the cartel in its supplemental answers, after the court had ordered GAC on at least six occasions to provide information from Gulf in those answers.[98]

The second of the excuses—the failure of the complaint or interrogatories to explicitly or implicitly mention the cartel is immaterial. United's right to information did

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[97] In its briefs on appeal, GAC describes the cartel as a marketing agreement, precisely the language used in Interrogatory 32.

[98] GAC points out that although the court had ordered it to produce Gulf information and documents, it had not ordered it to produce cartel documents. What "cartel documents" are in the context of this case, if they are not Gulf documents, has never been apparent to this Court. In any case, in March 1977, the court did order GAC to produce the Grand Jury and Duquesne documents, which, as GAC was later to concede, "all had to do with the cartel."

not turn upon its discovery of a magic formula. The scope of the definitions and questions in the First Set of Interrogatories clearly included the cartel. It was GAC's duty to fully answer the questions according to their terms. Its strained interpretation of the interrogatories to exclude the cartel amounts to "an attempt at gamesmanship, contrary to the principle that the purpose of our rules of discovery is to minimize concealment and surprise in litigation." *Hilmer* v. *Hezel*, 492 S.W.2d 395, 396 (Mo. Ct. App. 1973) (citation omitted). There was no reason for GAC's belief that the cartel was not covered by the interrogatories except its desire to so believe. However, its "ostrichlike attitude of self-delusion" cannot be accepted as establishing a good faith belief on its part. *Mitchell* v. *Hausman*, 261 F.2d 778, 780 (5th Cir. 1958). Although "a misunderstanding or misapprehension does not import wilfulness," *Kalosha* v. *Novick*, *supra*, 77 N.M. at 631, 426 P.2d at 601, "'[g]ood faith' . . . does not include ignoring the obvious." *Wirtz* v. *Lone Star Steel Company*, 405 F.2d 668, 670 (5th Cir. 1968). It should have come as no surprise to GAC that as part of its antitrust case, United would desire information on an organization whose purpose was, as a Gulf attorney described it, "to completely frustrate free competition," and in which the very officials of Gulf and GAC with whom United had dealt were involved.[99] GAC's understanding that the cartel was not within the scope of the First Set of Interrogatories could be characterized as follows: "If he did not know, it was because he did not look, or lookin, did not see, or want to see what was so plainly there." *Mitchell* v. *Raines*, 238 F.2d 186, 188 (5th Cir. 1956).

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[99] The executive vice-president of GAC, Gallaway, whose involvement in cartel discussions was discussed in Sections II A and B, *supra*, of this opinion, verified GAC's first answers to the First Set of Interrogatories, which failed to mention the cartel.

Even if this excuse had merit as to the first set of answers, it is no justification for the supplemental answers, for by April 1977, GAC was clearly on notice that the interrogatories encompassed the cartel.

In January 1977, when the court ordered GAC to include information on the partners' uranium activities in its supplemental answers, GAC asked if that ruling would require it to include in its answer to Interrogatory 30, information on "any properties [the partners] might hold in [their] individual capacity, anywhere in the world?" The court answered that such information "may be relevant to the issues in this case. If you make a claim that they are not relevant, the Court will pass upon it." The court proceeded to say that "the same ruling applies to" Interrogatories 31 through 34.

GAC then raised the issue of the Canadian regulations which were promulgated for the express purpose of preventing the disclosure of information on the cartel, thereby manifesting its understanding that such information was called for.

GAC argues that at the hearing on March 7, United disclaimed any interest in cartel discovery. The portion of the transcript it cites does not support this claim. United merely pointed out that it sought the Duquesne and Grand Jury documents "to get Gulf off the dime," and that Canadian law did not shield those records because they were in the United States. GAC conceded the latter point, although it raised the same objection five weeks later.

Nothing United's counsel stated at that or any other hearing could be construed as disclaiming an interest in cartel discovery—either from sources in the United States or elsewhere. In fact, at the hearing on March 7, United's counsel stated that the Grand Jury and Duquesne cartel documents "are clearly within the scope of interrogatories." He then referred specifically to Interrogatories

30, 32 and 33. Thus, GAC had been told that information on the cartel was expected in its supplemental answers. It is immaterial that United did not refer to the cartel by name. As GAC later told the trial court: "[T]his whole cartel thing . . . was what the whole grand jury thing was about and the whole Duquesne thing, that was what it was all about. It all had to do with the cartel." [100]

At another hearing on March 25, 1977, United's counsel alleged that both Allen and Hoffman were "active participants in the international uranium cartel." GAC's counsel objected on the grounds of relevancy, stating: "I can get up and deny that there is any truth to this." [101] United's counsel then made it abundantly clear that United sought cartel information. He said:

> My only point is this. *I would like for the Court to be alerted to that kind of material, when it reviews the documents.* This kind of anti-trust activity is illegal; it is a crime under the laws of the United

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[100] The fact that the Duquesne and Grand Jury documents were produced is no excuse for the total failure to mention the cartel in those answers. In January 1977, the court had held that "in addition to providing the documentation, you will have to answer the interrogatories. . . . [United is] entitled to their answers to interrogatories in addition to the right to inspect and copy documents, so that you will pin yourself down and bind yourself by your answers; instead of merely furnishing the document to them." That information on Gulf's participation in the cartel's marketing agreements could have been provided, apart from information in the cartel documents in Canada, is evidenced by the fact that GAC later filed three sets of answers to United's Second Set of Interrogatories on the cartel, and by the presence in the United States of several GAC and Gulf employees who were intimately familiar with the cartel.

[101] Seven months later, GAC's counsel informed the trial court: "Mr. Rolander, Mr. Gallaway, Mr. Allen, Mr. Hoffman, Mr. Zagnoli, all of them knew about the cartel." In fact, records GAC produced show that Allen and Hoffman were among Gulf's representatives at the Johannesburg meeting of the cartel in May and June 1972.

> States and under the laws of the State of New Mexico. And no privilege attaches to that. (Emphasis added.)

Counsel for GAC responded to what he called the "the continual reference to the so-called international uranium cartel," by stating that it was "very difficult to appreciate any possible relevancy of that cartel, if it did in fact exist." [102]

At the end of this hearing, the court again called for GAC to submit by the April 15 deadline all documents it claimed were privileged or irrelevant. Three weeks later, GAC submitted the supplemental answers which were silent on the cartel.[103]

GAC's third excuse—that the cartel was not raised as an issue until March 1977—is also without merit. In October 1976, United had referred to GAC's and Gulf's efforts to inject themselves into the cartel as an example of how they had violated the antitrust laws of New Mexico.[104] In its January 1977 answers to GAC's

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[102] On October 24, 1977, GAC's counsel stated: "Let's go to the cartel. It's undisputed. . . . It was in its intention a cartel in every sense of the word."

[103] By the end of March, United had submitted two proposed pretrial orders which listed GAC's and Gulf's participation in the cartel as a contested issue of law, and a proposed amendment to its complaint which charged that Gulf and GAC were members of a cartel which violated the New Mexico Antitrust Act, and that the 1973 Supply Agreement was obtained in furtherance of the cartel's activities.

I&M filed a counterclaim on March 7 containing allegations concerning the cartel. GAC's reply, filed on March 28, denied these allegations, thus placing the cartel squarely at issue.

[104] The document United referred to in support of this allegation was introduced into evidence at a hearing on November 1, 1976, over GAC's objection that the exhibit "has nothing to do with GAC, and has nothing to do with the issues in this case." How-

interrogatories, United had alleged that Gulf ruined the Gulf-United business by "collaborating" with the cartel to control uranium prices. More importantly, it is beside the point when the cartel was raised as an issue. It was GAC's obligation to provide discovery, or to seek guidance from the court as to the scope of its obligation. Any other rule would require the party seeking discovery to know what was in the opposing party's documents before he saw them. Finally, the concession that the cartel was an issue in March highlights the inadequacy of the supplemental answers GAC filed in April.[105]

The fourth excuse is also irrelevant. Although some United officials testified at the trial that they were aware that a group of foreign uranium producers, including Gulf Canada, were discussing uranium marketing, there was no evidence adduced that United knew of the extent of Gulf's involvement, of the partipation [sic] in the cartel of members of the Gulf-United board, or of cartel discussions involving Gulf competitors in the United States. GAC's argument also ignores the fact that the evidence shows that the cartel took "deliberate and elaborate steps to cloak its activities." *In re Uranium Antitrust Litiga-*

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ever, the exhibit contained two documents, both of which were written by and addressed to officials at Gulf Energy (Hunter, Rolander, Gregg and Hoffman), all of whom later occupied key positions in GAC. *See* Section II A, *supra* especially n. 16-17, *supra*. The documents referred to early cartel meetings in Canada. GAC unsuccessfully sought a protective order in order to keep these records sealed from the public.

[105] This concession also contradicts the representation GAC later made to the trial court. In an affidavit filed in March 1978 in support of its motion for reconsideration of the default judgment, a GAC attorney stated that he "did not consider or recognize" that the cartel was an issue in this case until August 1977. However, it was this very same attorney who objected on March 25, 1977 to what he called "the continual reference to the so-called international uranium cartel."

tion, supra, 480 F.Supp. at 1155. In any event, United did seek information on the cartel by virtue of its request for Gulf records in general, and for the Grand Jury and Duquesne cartel documents in particular.

GAC's final excuse for its failure to include information on the cartel in either set of its answers to the First Set of Interrogatories is that United had demonstrated by its inaction and representations that it did not consider the cartel to be covered by the First Set of Interrogatories. There is clearly nothing in the record to support this argument up to the time GAC served its first answers in April 1976. As we have seen, the record establishes that prior to the filing of the supplemental answers, United had made it abundantly clear that it sought information on the cartel, and had specifically informed GAC that cartel documents were within the scope of Interrogatories 30, 32 and 33.

Although United did not object to the failure of the supplemental answers to include information on the cartel until late 1977, this delay does not reflect a lack of desire for cartel information, nor does it constitute a waiver of any claim that GAC's supplemental answers were inadequate. *See* n. 95, *supra. In Hunter* v. *International Systems & Controls Corp., supra,* 56 F.R.D. at 623, the court said:

> [I]t is irrelevant to the question of whether there was a failure to make discovery to consider whether the moving party was later willing to settle for other materials than were originally requested. The purpose of Rule 37, *supra,* is to secure compliance with discovery rules and orders. (Citations omitted.)

Similarly, it is immaterial to the question of the good faith of GAC's supplemental answers that United was later willing to settle for *other means*—the Second Set of Interrogatories—of securing information on the cartel.

As United's counsel stated in August 1977: "[T]he necessity for these late interrogatories [the Second Set] was brought about by the difficulty of obtaining information from Gulf."

The trial court's finding that no law of Canada prohibited the production of cartel documents as of March 1976, is also essentially correct. GAC did contend both to the trial court [106] and to this Court that "GMCL [Gulf Canada] was barred at all relevant times by the Ontario Business Records Protection Act [1947, Ont. Rev. Stat. c. 54 (1970)] from producing [cartel] documents." However, at the oral argument of this appeal, GAC abandoned this position. GAC's counsel stated:

> [T]here were no legal impediments until then [September 1976]. There was . . . the Ontario Business Records Act in effect at the time period we are talking about. *But the Ontario Business Records Act is no impediment to discovery.* It prevented documents from being taken out of Canada. But those documents could be inspected in Canada by appellees or by anybody else. They could be used for depositions of GMCL [Gulf Canada] personnel in Canada, notes could be taken on them and notes could be brought back here. (Emphasis added.)

GAC never made the foregoing explanation of the Ontario Act to the trial court,[107] contrary to the well-established rule that "[o]bjections to interrogatories must be specific and be supported by a detailed explanation as

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[106] GAC first raised the Ontario Business Records Protection Act as a bar to discovery on March 1, 1977. It again relied on it in October 1977, and thereafter.

[107] Other courts have held the Ontario Business Records Protection Act to be inapplicable in similar situations. *See In Re Uranium Antitrust Litigation, supra,* 480 F.Supp. at 1143; *American Industrial Contr., Inc.* v. *Johns-Manville Corp.,* 326 F.Supp. 879, 880 (W.D. Pa. 1971).

to why interrogatories or a class of interrogatories is objectionable." [108] The "bald assertion that production of the requested information would violate a privilege [provided by law] is not enough." [109] The party resisting discovery has the burden "to clarify and explain its objections and to provide support therefor." [110] "General objections without specific support may result in waiver of the objections." [111] These principles are equally applicable to objections based on foreign nondisclosure laws.[112] Instead of explaining the operation of the Ontario Act to the trial court as it did to this Court, GAC simply insisted that the Act was a complete bar to all discovery of cartel records. "[S]uch complete reversal of position . . . show[s] 'callous disregard of responsibilities' owed" by GAC and its counsel to the court and to the adversary parties. *Furrenes* v. *Ford Motor Co., supra,* 255 N.W.2d at 516. *See also State of Ohio* v. *Crofters, Inc., supra,* 75 F.R.D. at 19-20.

Had GAC been more assiduous in its responsibility in discovery prior to September 23, 1976, Canadian cartel discovery could have been made without any serious foreign law entanglements. *Accord State of Ohio* v. *Crofters, Inc., supra,* 75 F.R.D. at 23. By failing to provide cartel information prior to the passage of the Canadian Uran-

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[108] *United States* v. *58.16 Acres of Land, Etc., Clinton Cty. Ill., supra,* 66 F.R.D. at 572 (citations omitted). *See also In Re Folding Carton Antitrust Litigation,* 83 F.R.D. 260, 264 (N.D. Ill. 1979).

[109] *Miller* v. *Doctor's General Hospital,* 76 F.R.D. 136, 139 (W.D. Okla. 1977).

[110] *Roesburg* v. *Johns-Manville Corp., supra,* 85 F.R.D. at 297 (citations omitted).

[111] *Id.* (citation omitted).

[112] *See State of Ohio* v. *Arthur Andersen & Co., supra,* 570 F.2d at 1374; Note, "Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation, 88 Yale L. J. 612, 624 (1979).

ium Information Security Regulations, and then relying on these Regulations as an excuse for nonproduction, GAC is "in the position of having slain [its] parents and then pleading for mercy on the ground that [it] is an orphan." *Life Music, Inc.* v. *Broadcast Music, Inc., supra*, 41 F.R.D. at 26. *Accord Shepard* v. *General Motors Corporation*, 42 F.R.D. 425, 427 (D. N.H. 1967).

Finally, the court's finding that from December 31, 1975 to the date of the promulgation of the Uranium Information Security Regulations, GAC did not inform either United or the trial court about the existence of the cartel, Gulf's participation therein, or about Gulf cartel documents located in Canada, is fully supported by the record. There is not a scintilla of evidence to contradict it. As late as March 1977, GAC was objecting to references to the cartel, "if it did in fact exist," and denying United's allegation that Allen and Hoffman were participants in the cartel.

2. *The Second Set of Interrogatories*

a. *The Court's Recitals on the Second Set of Interrogatories and the Identification and Production of Canadian Cartel Documents*

The following summarizes the pertinent recitals of the trial court in the sanctions order and default judgment concerning GAC's discovery failures subsequent to the filing of the Second Set of Interrogatories on August 16, 1976:

> 1. GAC's first answers to the Second Set of Interrogatories consisted in large measure of a "do-it-yourself" kit, merely directing United to deposition pages. These answers were defective, incomplete, inadequate and unacceptable. The answers failed to identify cartel documents as called for by the interrogatories.

2. GAC's second answers to these interrogatories excluded all information contained in Gulf documents in Canada and did not identify the documents as GAC had been ordered to do on October 11, 1977. These answers did not comply with the court's order to make complete, good faith, non-evasive answers.

3. GAC's third answers to these interrogatories were unresponsive and evasive to the questions asked and were mere legal argument in many instances. The answers also failed to make a commitment to a set of facts, posture or position on the subject matter of the interrogatories. Instead, GAC simply stated that various cartel documents "purport to" reflect certain events. GAC steadfastly refused to admit that such events took place or to state true facts concerning the cartel.

4. GAC's three sets of answers to the Second Set of Interrogatories showed disdain for the court's orders, and coupled with what had gone before, constituted obstruction of justice and demonstrated a wilful deliberate, and flagrant scheme of delay, resistance, obfuscation and evasion. GAC has willfully, intentionally, deliberately and in bad faith, failed and refused to answer the Second Set of Interrogatories.

5. GAC did not make a good faith and diligent effort to secure the release of documents in Canada or the information contained in them. GAC's efforts to obtain a waiver of Canadian nonproduction laws demonstrated an intent to conceal evidence on the cartel, rather than a good faith effort to produce such information.

6. Gulf followed a conscious and deliberate policy of housing cartel documents in Canada, rather than in the United States. This action amounted to de-

liberately courting legal impediments to the production of the records.

7. GAC's failure to provide documents from the files of Gulf Canada was not based on inability to comply with production requests, but rather, on a bad faith refusal to produce.

8. GAC deliberately and improperly failed to inform the court and opposing parties in a timely manner of the actions of U.S. District Judge Snyder on August 10, 1977 deprivileging and making public documents turned over to him by Gulf in another case. GAC never accurately disclosed the existence of all of the documents turned over to Judge Snyder. These documents were called for by the First Set of Interrogatories, but the existence of most of them was not disclosed until over a year after those interrogatories were filed. The existence of some Snyder documents was not disclosed until after Judge Snyder deprivileged them. Some of these documents were first identified and produced only after United brought the matter to the attention of the trial court. The failure to reveal the existence of and to identify all Snyder documents in a timely fashion was a deliberate attempt to further conceal those documents and avoid producing relevant information.

9. GAC in bad faith failed to reveal the existence of documents it produced to a federal grand jury in January 1978, to the trial court or to the opposing parties until after United had learned of their existence from a third party and made a demand upon GAC.

b. *The Proceedings from April 1977 to March 1978*

Four days after filing its massive supplemental answers to the First Set of Interrogatories, GAC moved

to extend the discovery period to March 1, 1978, and to delay the trial until April 1978. At the hearing on this motion, GAC asked that the trial setting be further postponed until October 1978. The trial court rejected this delay, but it extended the discovery period from July 1, 1977 to September 1, 1977, and set the trial date for October 31, 1977.

Discovery continued throughout the spring and summer of 1977, during which time the parties produced and reviewed thousands of pages of documents. During this period, GAC alone deposed almost one hundred persons.

Beginning in late May, the Congressional subcommittee began to hold hearings on the cartel. *See Hearings on International Uranium Cartel, supra.* Various Gulf officials were prominent witnesses. New cartel records were released and much information was developed on Gulf's role in the cartel.

On August 16, 1977, one day after the last of these Congressional hearings, United served its Second Set of Interrogatories. These interrogatories inquired in great detail into the cartel and Gulf's role therein. United also filed motions for the production of cartel documents.

One week later, GAC filed objections to the Second Set of Interrogatories and the motions to produce. With the exception of a single specific document United had requested, the objections made no reference to any Canadian nondisclosure laws. GAC's objections were based on the grounds that the interrogatories were untimely, "unduly lengthy, burdensome, oppressive and harrassing," and inquired into irrelevant matters.

At the hearing on these objections, United contended that the necessity for the Second Set of Interrogatories "was brought about by the difficulty of obtaining information from Gulf." GAC responded that most of the information covered by the interrogatories had already been

provided, particularly with the production of the Grand Jury and Duquesne documents. GAC's counsel specifically objected to the notion that "this whole cartel thing is something new" in this case.[113]

The trial court overruled GAC's objections, but it granted an extension until September 20, 1977—only one day short of the date GAC had requested—to file answers to the interrogatories. The court also gave GAC until September 5, 1977, to file additional, "specific" objections to the interrogatories. The court asked if GAC had any objection to attaching responsive documents to its answers to the extent it was required to answer the interrogatories. GAC stated that it had no such objections. It made no mention of Canadian nondisclosure laws.

In its specific objections to the interrogatories, GAC again did not mention the foreign nondisclosure laws. At the hearing on these objections, GAC promised to include in its answers information from the senior management of Gulf Canada. The court modified certain interrogatories, but it otherwise overruled GAC's objections. It stated that in identifying documents, a summary of the contents need not be provided if the documents were produced.

The day before the answers were due, GAC filed a motion for a nextension until September 26, 1977, to answer the interrogatories. The court granted the extension, but it warned that sanctions would be imposed if the interrogatories were not answered. GAC represented that ninety to ninety-five percent of the information called for by the interrogatories had already been pro-

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[113] Six months later, GAC took the position that the cartel was first raised as an issue when the Second Set of Interrogatories was filed in August. It has abandoned this position on appeal, as it must. *See* n. 103 and 105, *supra*, and accompanying text.

vided to United. Once again, GAC failed to raise the question of Canadian nondisclosure laws.

On September 26, GAC filed its first set of answers to the Second Set of Interrogatories. Although narrative answers were made to most questions, virtually all the answers contained the statement that responsive information was contained in depositions and documents previously produced. GAC cited extensive lists of references to specific depositions and exhibits. GAC finally raised the issue of Canadian law, stating that information contained in the documents of Gulf Canada as well as the documents themselves would not be provided because of the proscriptions of unspecified Canadian statutes and regulations.

United moved to compel further answers to the Second Set of Interrogatories on the grounds that the answers of September 26 were inadequate, that only a few documents were produced, and that no documents were identified in the answers. United also sought the production of cartel documents, and requested that sanctions be imposed. In an accompanying brief, United alleged that Gulf had "deliberately placed documents in Canada so as to make them more difficult for U.S. courts to subpoena." I&M joined in this motion. In response, GAC relied for the first time since March 1977 on the Ontario Business Records Protection Act and the Uranium Information Security Regulations as excuses for the nonproduction of cartel documents located in Canada.

At the hearing on the motion, GAC's counsel assured the court that "[e]very document that is available in the United States that are responsive to these interrogatories have been produced." However, some documents were not produced until February 1978. Again, GAC stated that Canadian laws barred the disclosure of documents in Canada. United again responded by contending that Gulf had deliberately housed documents in Canada

in order to avoid their disclosure in courts in this country. The court took the motions under advisement, again warning that it expected "full, complete, good faith discovery."

On October 11, 1977, the court granted the motion for further answers to the interrogatories, finding that most of the first answers were "defective, incomplete, inadequate and unacceptable." The court held that GAC was obligated to make "a firm commitment to a set of facts, posture or position on the subject matter of the interrogatory" in its answers, and that the references in the answers to depositions and other documents were inadequate. The court ordered that new answers be filed by October 20, 1977.

The court also found that GAC had failed to provide the identification of documents called for by the interrogatories, and it ordered compliance with this request. The court found that GAC had not "in good faith, without evasion or reservation" produced all cartel documents in the United States, and ordered that this be done. The court also found that GAC had not make a good faith effort to produce cartel documents in Canada. The court stated that GAC was obligated to make "an immediate diligent and good faith effort to obtain a lawful waiver of or dispensation from" Canadian nondisclosure laws in order to lawfully produce those records. The court said that GAC had not shown that identification of the documents was violative of Canadian law, and it ordered GAC to "separately, clearly and definitively" identify all documents called for by the interrogatories. Again, the court warned that further failures to abide by its orders to make good faith discovery would subject the offending party to sanctions.

On October 13, GAC wrote to the Canadian Minister of Energy, Mines and Resources, requesting a waiver of the Uranium Information Security Regulations in order

to produce the records and permission to identify the documents *with* a summary of their contents. The Canadian Minister refused to grant a waiver, and stated that identification of the documents "in the manner described in [GAC's] letter" would violate the Regulations. On October 21, 1977, GAC filed the Canadian Minister's reply to its request for a waiver, along with its second set of answers to the interrogatories.

On November 4, 1977, four days after the trial began, United again moved to compel GAC to identify and produce all cartel documents and to identify those documents in Canada without a summary of contents. United argued that GAC's second answers were inadequate for failure to identify documents located in Canada, and it charged that Gulf had deliberately courted legal impediments to production of the cartel records by housing them in Canada. It requested that the court find all facts provable by those documents against GAC as a sanction under Rule 37(b)(2)(i).

On November 8, 1977, GAC wrote a second letter to the Canadian Minister requesting permission to identify the Canadian cartel documents without a summary of their contents. The Minister informed GAC that as a result of a decision of the Supreme Court of Ontario on November 9, 1977, he was unable to consider its request.

After hearings on United's motion of November 4, the court found that GAC had failed to produce the documents in part because of "its own early and deliberate policy of housing such documents in Canada." The court held that its order of October 11 had not required identification of the documents with a summary of their contents. It indicated that GAC's request of October 13 to the Canadian Minister to so identify them was an attempt to avoid that order. Again the court ordered GAC to "clearly and definitively" identify all documents in

Canada, and it stated that facts provable from documents housed in Canada would be found against GAC.

In December, I&M moved to compel further answers to United's Second Set of Interrogatories. United joined in this motion. On December 27, 1977, the court granted the motion for further answers, and stated that GAC had still failed to show to its satisfaction that the simple identification of cartel documents would violate Canadian law. However, the court held that sanctions would have to be imposed under Rule 37 for failure to comply with its order of November 18, even if such identification was prohibited. The court found that GAC's second set of answers had not complied with its previous orders to give "complete, good faith and non-evasive answers" to the Second Set of Interrogatories. The court set January 13, 1978, as the deadline for the filing of new answers, and again threatened to impose sanctions for further discovery failures.

After receiving two more extensions of time, GAC filed its third set of answers to the Second Set of Interrogatories on February 1, 1978. Nine days later, United again moved for a default judgment based on all of GAC's previous discovery failures. United asserted that GAC's third set of answers to its Second Set of Interrogatories were "deficient and defective in almost every respect," and that GAC had willfully refused to answer the interrogatories in good faith. United also alleged that GAC had willfully and deliberately withheld certain documents which it had submitted to the federal grand jury in Washington, D.C. I&M joined in this motion.

GAC then moved for an evidentiary hearing on the allegations that it had acted in bad faith. The motion was accompanied by various affidavits, including several from Gulf and GAC officials on the question of the housing of cartel documents in Canada. The parties filed briefs and proposed findings of fact on the motions for

sanctions. On March 2, 1978, the trial court entered its sanctions order and default judgment, in which it found all issues of liability against GAC and in favor of United and I&M.

GAC filed a motion, accompanied by additional affidavits, for reconsideration of the sanctions order and default judgment. This motion was denied.

c. *Analysis of the Recitals on the Second Set of Interrogatories and the Identification and Production of Canadian Cartel Documents*

We will examine these findings in the following order: (1) The adequacy of the three sets of answers to the Second Set of Interrogatories; (2) the failure to identify or produce cartel records located in Canada, including the findings that GAC had failed to make good faith efforts to obtain a waiver of the Canadian nondisclosure laws and that it had deliberately courted legal impediments to the production of those records by housing them in Canada; and (3) the production of the Snyder and Grand Jury documents.

(1) *GAC's Answers to the Second Set of Interrogatories*

Before examining the propriety of the trial court's recitals concerning the inadequacy of GAC's three sets of answers to United's Second Set of Interrogatories, it is necessary to consider GAC's contention that the trial court erred in overruling its objections to those interrogatories.

GAC originally objected on the grounds that the interrogatories were "unduly lengthy, burdensome, oppressive and harrassing." It also contended that they were untimely because they were served only fifteen days before the date set for the end of all discovery. GAC later contended that the interrogatories were duplicative of the First Set of Interrogatories, and that although prior

court orders had required the parties to produce their documents, there was "a clear distinction" between requiring the partners to produce documents and to answer interrogatories.[114]

We hold that the trial court did not abuse its discretion in overruling these objections. The interrogatories were filed within the period set for discovery. As United argued, "the necessity for these late interrogatories was brought about by the difficulty of obtaining information from Gulf." Had GAC properly answered the First Set of Interrogatories, and had it been more diligent in producing documents from the partners, the need for these late interrogatories would have been obviated in whole or in part.[115]

The objection that the interrogatories were harrassing is without merit for the same reason. As was stated in *SCM Societa Commerciale S.P.A.* v. *Ind. & Com'l Res.*, 72 F.R.D. 110, 114 (N.D. Tex. 1976):

> [T]he short answer to Defendant's contention is that much of the Plaintiff's so-called harassment has

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[114] GAC also objected on the grounds that the interrogatories inquired into irrelevant matters. This contention is addressed in Section II B, *supra*, of this opinion.

[115] For the same reason, it was not error for the trial court to refuse to grant GAC's motion for a continuance of the trial setting or to require additional discovery from GAC during the course of the trial. In *Wieneke* v. *Chalmers*, *supra*, 73 N.M. at 12, 385 P.2d at 68, this Court held that it was within the sound discretion of the trial court to permit additional discovery during the course of a trial, particularly where the need for it results from previous failures to make discovery. In refusing to grant a continuance in this case, the trial court noted that the remaining discovery "in good faith should have been taken care of earlier." In these circumstances, "[t]o grant another continuance would in effect be a sanction against the Court." *G-K Prop.* v. *Redevelop. Agcy. of City of San Jose*, 409 F.Supp. 955, 959 (N.D. Cal. 1976), *aff'd*, 577 F.2d 645 (9th Cir. 1978).

become necessary because of the Defendant's failure to comply with this Court's orders.

GAC's third objection—that the interrogatories duplicated the First Set of Interrogatories—is also without merit. "A claim of duplication is insufficient, unless all documentary material from which the interrogatory answers may be conveniently obtained has been previously provided." *In Re Folding Carton Antitrust Litigation*, *supra*, 83 F.R.D. at 264-65 (citation omitted). Even GAC has never contended that all documentary evidence on the cartel has been produced.

GAC's objection that the prior orders of the court did not require the partners to provide answers to interrogatories was a spurious argument. Not only had the court so held,[116] but also, its holding was legally correct. *See* Section II A, *supra*.

We turn now to the question of whether the trial court's recitals on the inadequacy of GAC's answers to the interrogatories were correct. In making this determination, we are guided by the principle that "[u]ltimately, the question of what constitutes satisfactory responses to interrogatories rests within the sound discretion of the Court." *Martin* v. *Easton Publishing Co.*, 85 F.R.D. 312, 316 (E.D. Pa. 1980).

The first answers consisted in large measure of references to documents and to depositions, many of which had been taken in other litigation. After hearing argument and reviewing the answers and referenced documents and depositions, the trial court concluded that these answers were inadequate and unacceptable, in part be-

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[116] At a hearing on January 11, 1977, the court stated: "[W]henever an interrogatory is propounded to General Atomic, it is propounded to GAC's constituent partners also. That is my ruling. The interrogatories . . . [are] obligatory upon the constituent partners." On January 21, the court entered an order to this effect.

cause most of the information contained in the references was subject to wide differences of opinion and interpretation and was "vague, indefinite, uncertain, incomplete, elusive and non-responsive." In the sanctions order and default judgment, the court stated that these answers had constituted "a do-it-yourself" kit. *See Life Music, Inc.* v. *Broadcast Music, Inc., supra,* 41 F.R.D. at 25.

Although GAC referred to specific pages in the referenced documents and depositions in its answers, rather than committing the universally condemned practice of referring to a mass of undifferentiated material,[117] our review of the record satisfies us that the court did not abuse its discretion in finding these answers to be unacceptable.

First, much of the material GAC referred to was "elusive and non-responsive." [118] A party cannot answer an interrogatory simply by reference to another equally unresponsive answer. *Martin* v. *Easton Publishing Co., supra,* 85 F.R.D. at 315.

Second, the purpose of interrogatories is to narrow and clarify the basic issues between the parties and to permit

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[117] *Martin* v. *Easton Publishing Co., supra,* 85 F.R.D. at 315; *Flour Mills of America, Inc.* v. *Pace,* 75 F.R.D. 676, 682 (E.D. Okla. 1977); *Kozlowski* v. *Sears, Roebuck & Co.,* 73 F.R.D. 73, 76-77 (D. Mass. 1976); *Harlem River Con. C., Inc.* v. *Associated G. of Harlem, Inc., supra,* 64 F.R.D. at 462; *Budget Rent-A-Car of Missouri, Inc.* v. *Hertz Corporation,* 55 F.R.D. 354, 357 (W.D. Mo. 1972); *Life Music, Inc.* v. *Broadcast Music, Inc., supra,* 41 F.R.D. at 25; *Smith* v. *Danvir Corporation,* 55 Del. 418, 188 A.2d 118, 120-21 (1963).

[118] For example, one such reference was to thirty-two pages of the deposition of Zagnoli, the head of Gulf Minerals, which had been taken in the Westinghouse litigation. In twenty-two of those pages, Zagnoli answered questions with the phrases "I do not recall" twenty-one times and "I don't know" twelve times. When Zagnoli was asked if "I don't recall" meant the same thing as "I don't know," he responded: "I don't know that."

the ascertainment of the facts relative to those issues. *Smith* v. *Danvir Corporation*, 55 Del. 418, 188 A.2d 118, 120 (1963). As one court stated:

> Incorporation by reference of portions of a deposition of a witness, much of it discursive, . . . is not a responsive answer. The fact that a witness testified on a particular subject does not necessarily mean that a party who is required to answer interrogatories adopts the substance of the testimony to support his claim or contention.

J.J. Delaney Carpet Co. v. *Forrest Mills, Inc.*, 34 F.R.D. 152, 153 (S.D. N.Y. 1963). *See also Martin* v. *Easton Publishing Co., supra*, 85 F.R.D. at 315. Such answers make it impossible to satisfy the purposes of interrogatories because a party's admissions under oath cannot be obtained. *Life Music, Inc.* v. *Broadcast Music, Inc., supra*, 41 F.R.D. at 26.

This problem was clearly apparent in this case. When United sought to admit into evidence at trial the portions of the documents referred to in GAC's interrogatory answers, GAC objected on the grounds that the references "contain opinions, conclusions, . . . legal contemplation speculations," and hearsay. GAC's counsel informed the court that it made the references "without knowing whether or not they were the best evidence or whether they were reliable or trustworthy." GAC's first answers cannot be read as stating that GAC and Gulf did not have or could not obtain information necessary to give narrative answers to the interrogatories. If, as GAC later represented, neither it nor Gulf could furnish the information, it should have so stated at the very outset. *See In Re Master Key*, 53 F.R.D. 87, 90 (D. Conn. 1971).

Even more significant than the inadequacy of the references contained in the answers, however, was GAC's failure to identify or include information from cartel

documents located in Canada. GAC's failure to promptly bring the problem of Canadian nondisclosure laws to the attention of the trial court is inexplicable. GAC failed to mention the problems posed by those laws in either set of its objections to the interrogatories. Instead, GAC promised the trial court in August that it would attach responsive documents to its answers, but it did not qualify that promise with any territorial limitations as to their location, even though neither the interrogatories themselves nor the court's order to answer them restricted the scope of inquiry to materials in the United States. At the hearing on GAC's "specific" objections, GAC promised to answer the interrogatories "on the basis of the knowledge, the present knowledge of the senior management of the corporation, *including the senior management of Gulf Minerals Canada* and Gulf Minerals Resources," (emphasis added), but it did not represent that it could only answer on the basis of the knowledge of officials of Gulf Canada who were located in the United States. When GAC received another time extension on the day the answers were due, it again failed to disclose foreign law obstacles. Only when it filed its answers did GAC finally raise upspecified foreign laws as a bar to the production of information on the cartel.

This failure to promptly raise the foreign law problem was contrary to settled principles of law governing discovery. As we previously noted, objections to interrogatories must be raised within the time provided by Rule 33 or within any extension of time granted by the trial court. The provisions of that rule "should be strictly adhered to." *Lackey* v. *Mesa Petroleum Co.*, 90 N.M. 65, 67, 559 P.2d 1192, 1194 (Ct. App. 1976). As the court stated in *Philpot* v. *Philco-Ford Corporation*, 63 F.R.D. 672, 674 (E.D. Pa. 1974): "A full and precise understanding of the . . . Rules of Civil Procedure will surely escape even the most erudite attorney if he chooses not

to read them." (Footnote omitted.) In general, the filing of an answer to an interrogatory is deemed a waiver of the right to object. *Kozlowski* v. *Sears, Roebuck & Co.*, 71 F.R.D. 594, 597 (D. Mass. 1976); *Harlem River Con. C., Inc.* v. *Associated G. of Harlem, Inc.*, *supra*, 64 F.R.D. at 465; *Skelton & Co.* v. *Goldsmith*, 49 F.R.D. 128, 130, n. 1 (S.D. N.Y. 1969); *Riley* v. *United Air Lines, Inc.*, 32 F.R.D. 230, 234 (S.D. N.Y. 1962).

The failure to immediately raise this problem, particularly when considered in light of the trial, set to begin in only four weeks, was itself evidence of a lack of good faith. In *Shepard* v. *General Motors Corporation*, *supra*, 42 F.R.D. 425, the defendant failed to answer interrogatories, and later informed the court that it could not answer because key employees had either died or retired. The court imposed sanctions, stating:

> The defendant had the opportunity [at two previous hearings] in conjunction with previous motions concerning this set of interrogatories, to inform both the Court and counsel for the plaintiffs that Gandelot was no longer in the employ of General Motors. . . . [N]o explanation was given for the defendant's failure to raise this matter sooner and, therefore, the Court cannot now accept such an untimely objection. Defendant's conduct amounts to a deception of this Court and said conduct has materially hampered plaintiffs' counsel in the preparation of these cases.

Id. at 427. *Cf. United States* v. *3963 Bottles, More or Less, Etc.*, 265 F.2d 332, 337 (7th Cir. 1959), *cert. denied*, 360 U.S. 931 (1959). ("[T]hough first representing to the court that it had such information available and implicitly offering it in support of this motion, when it was later served with interrogatories seeking details of such 'extensive research and consultation,' claimant asserted its claimed privilege"); *Perry* v. *Golub*, *supra*, 74 F.R.D. at 368 ("The fact that the defendants

advanced these requested conditions long after the expiration of the period for the filing of objections and *after they had represented to the Court at the hearing that the documents would be produced* is further evidence of the defendants' intransigent conduct in responding to discovery and in complying with the Court's Order") (citation omitted and emphasis added).

GAC had full knowledge at the time the Second Set of Interrogatories was filed that Canadian laws posed a problem for the production of cartel information, for it had informed the court six months earlier that it was prepared to present those proscriptions to the court. However, it was apparently unprepared or unwilling in September to do what it had promised in March; it clearly was not unable to do this in a prompt manner.[119]

Third, even if the reference in the answers to unspecified foreign laws could be considered to have been timely, it was not sufficient. The simple assertion that production would violate the laws of Canada did not comport with established principles governing the filing of objections. *See* n. 108-112, *supra*, and accompanying text.

Finally, GAC was under a duty to make every effort to obtain the requested information and, if, after adequate effort, it was unsuccessful, its answers should have recited in detail the attempts which it made to acquire the information. *Jackson* v. *Kroblin Refrigerated Xpress, Inc.*, 49 F.R.D. 134, 137 (N.D. W. Va. 1970). *See also Budget Rent-A-Car of Missouri, Inc.* v. *Hertz Corporation, supra*, 55 F.R.D. at 357; *Breeland* v. *Bethlehem Steel Company,*

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[119] GAC's mention in March of the proscriptions of those laws is no excuse for its failure to raise the point in August and September. As far as the trial court knew, the laws might have been repealed, or a waiver of them secured. In any case, in March GAC had not specified those proscriptions with the particularity the law requires.

179 F.Supp. 464, 467 (S.D. N.Y. 1959); 4A J. Moore, *Federal Practice* § 33.26, p. 33-140 (2d rev. ed. 1980). Until ordered by the court to seek a waiver of Canadian law, GAC did nothing at all, with full knowledge that, at that time, the Uranium Information Security Regulations contained a provision permitting a Canadian Government Minister to consent to the disclosure of cartel information. None of the foregoing failures bespeak of GAC's good faith response to its discovery obligations under the rules or the orders of the court.

As the trial court found, GAC's second set of answers failed to comply with the court's order to identify cartel documents in Canada and failed to contain information from those documents. However, it was not until the filing of these answers that GAC first informed the trial court that, contrary to its earlier representation, it would not provide information from persons in Canada because of Canadian law.

The trial court found that GAC's third set of answers were inadequate because they did not contain "a commitment to a set of facts, posture or position," but merely stated that various cartel documents "purport to" reflect certain events. Based on our review of those answers and the following factors we discuss, we are unable to say that the court abused its discretion in making this finding.

GAC contends that it could not have been faulted for merely stating that certain documents "purport to" reflect certain events, because no personnel employed by GAC or Gulf at the time the answers were prepared were able to verify the contents of those documents. GAC points out that a response to an interrogatory indicating that a party does not know the answer is sufficient if that, in fact, is the case, (*see Harlem River Con. C., Inc.* v. *Associated G. of Harlem, Inc., supra*, 64 F.R.D. at 463; *Robèrson* v. *Great American Insurance Companies of*

N.Y., 48 F.R.D. 404, 411 (N.D. Ga. 1969); 4A J. Moore, *Federal Practice* § 33.26, at 33-140 (2d rev. ed. 1980)), and that where the information is obtained from third persons, the party is not required to admit its accuracy. *Riley* v. *United Air Lines, Inc., supra*, 32 F.R.D. at 233; 4A J. Moore, *Federal Practice* § 33.26, at 33-145 (2d rev. ed. 1980).

Although these are correct statements of basic principles, they do not aid GAC. The time for stating the limited extent of its knowledge and the absence of personnel to make responsive answers had long since passed. If GAC and Gulf were not able to vouch for the contents of their own business records, GAC should have promptly so informed the trial court.[120] Instead, when it promised to attach responsive documents to its answers and to answer "on the basis of the knowledge . . . of the senior management" of Gulf and its subsidiaries, GAC made no representation that the senior management was without sufficient knowledge to answer, or that it could not vouch for the authenticity of the "responsive" documents. In its first answers, GAC represented that various documents and depositions contained answers to United's questions, but it did not represent that it could not vouch for the reliability of the information contained in the references it gave. It was only after United attempted to admit these references at trial that GAC informed the court that it did not know "whether they were reliable or trustworthy."

Even if GAC and Gulf no longer employed personnel who could commit GAC to a posture, position or set of

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[120] GAC did inform the trial court on September 9, 1977, that some employees who were active in the cartel no longer were employed by GAC or Gulf. But it did not represent that it would be unable to furnish responsive answers because of their absence, either at that time or in its original answers of September 26, 1977.

facts concerning the cartel, this inability merely highlighted the significance of the cartel documents located in Canada, and demonstrated the insolubility of the dilemma created by GAC's earlier discovery failures.

In any event, answers to interrogatories were an inadequate substitute for full production of records on the cartel. Without those documents, appellees were in no position to challenge the veracity, responsiveness, or completeness of those answers. As one commentator has stated: "The heart of any American antitrust case is the discovery of business documents. Without them, there is virtually no case." Note, "Discovery of Documents Located Abroad and U.S. Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-production" 14 Va. J. Int'l L. 747 (1974). As Judge Marshall concluded in the *Westinghouse* case, when he ordered production of Gulf's Canadian cartel documents:

> That is especially true when plaintiffs allege an antitrust conspiracy which has taken deliberate and elaborate steps to cloak its activities. "If true, the nature of the activities must be ferreted out of dark and obscure corners." The documents at issue here are crucial to plaintiffs' proof. (Citation omitted.)

In Re Uranium Antitrust Litigation, supra, 480 F.Supp. at 1155.

(2) *Production and Identification of Canadian Cartel Documents*

GAC contends that because Canadian law forbids production of cartel documents in the custody of Gulf Canada in Canada, its failure to produce them in this litigation was based on an inability to comply, and that such an inability could not be the basis for a default judgment.

The first part of this argument is undoubtedly correct—the Uranium Information Security Regulations prohibit the production of the documents or the release of their contents. Those Regulations, and the act under which they were promulgated, contain criminal sanctions for their violation. It is now clear that there is no possibility of a relaxation of those proscriptions. *See* n. 125, *infra*.

The question of the power of a court to impose the severe sanctions provided by Rule 37(b)(2)(iii) for a party's failure to produce documents located in a foreign country where the laws of that country forbid their disclosure was addressed in *Societe Internationale* v. *Rogers*, *supra*, 357 U.S. 197. The facts of that case were set forth in Section II C(2)(a), *supra*, of this opinion, where we discussed the aspect of *Societe* which addressed the propriety of an order to produce documents whose disclosure is prohibited by foreign law. The second aspect of *Societe* is the propriety of sanctions imposed for a party's failure to comply with such an order. In this section we are concerned with the latter issue.

In *Societe*, the Court held that where a plaintiff had in good faith made diligent efforts to secure the documents that could not be released without violating a foreign nondisclosure law, dismissal of the action was an inappropriate sanction under Rule 37. The Court stated that fear of criminal prosecution resulting from production of the documents "constitutes a weighty excuse for nonproduction." 357 U.S. at 211. However, the Court did not hold that foreign nondisclosure laws completely preclude the imposition of sanctions. Rather, the Court said that the reasons for noncompliance and the willfullness or good faith of the party "can hardly affect the fact of noncompliance and are relevant only to the path which the District Court might follow in dealing with petitioner's failure to comply." *Id.* at 208. The Court stated that in

the absence of complete disclosure, the district court possessed "wide discretion to proceed in whatever manner it deems most effective." *Id.* at 213. It indicated that the court could draw inferences of fact unfavorable to the plaintiff as to particular events related to the nonproduced documents.

GAC contends that under *Societe* the default judgment was an improper sanction for its inability to produce the Canadian cartel records. We disagree. The touchstone of *Societe* is that such a sanction is not permissible where the failure to comply with the court's production order was "due to inability, and not to willfullness, bad faith, or any fault of" the noncomplying party. *Id.* at 212. In *Societe*, the Court found that the plaintiff had made "extensive efforts at compliance," and that its failure to produce "was due to inability fostered neither by its own conduct nor by circumstances within its control." *Id.* at 211.

In this case, the trial court found that GAC's failure to produce the documents in Canada was not based on inability; rather, it was due to its own bad faith conduct. The recitals of bad faith upon which that conclusion was based are supported by the record. As the trial court found, GAC's misconduct in discovery involved more than merely the failure to produce documents located in Canada. The record here is hardly similar to the one that was before the Court in *Societe*.[121]

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[121] For similar reasons, GAC's reliance on *In Re Westinghouse Elec. Corp. Uranium, Etc., supra*, 563 F.2d 992, is misplaced. There the court reversed a contempt citation against Rio Algom for its failure to comply with subpoenas, where compliance would have violated the same Canadian regulations at issue here. However, the Court of Appeals found that Rio Algom had acted in good faith; had made a diligent effort to produce records which were not subject to the Canadian regulation; and had made an adequate effort to secure a waiver of the regulations from Canadian authorities. In this case, the trial court made findings to the con-

There are two additional aspects of GAC's failure to produce the documents in Canada which the Court in *Societe* suggested were material to the propriety of the imposition of a Rule 37(b)(2)(iii) sanction. The first concerns GAC's efforts to secure a waiver of the Canadian law; the second involves how the documents came to be located in the foreign nation. The trial court made findings on both issues in this case, which will be separately considered here.

In *Societe*, the Court pointed out that the plaintiff, a Swiss company, was "in a most advantageous position to plead with its own sovereign for relaxation" of the Swiss nondisclosure laws, in order to achieve at least a significant measure of compliance with the court's production order. *Id.* at 205. It suggested that a party is required to make all maximum efforts to secure the release of the documents. In this case, the trial court found that GAC had not made a good faith effort to secure a waiver of or dispensation from the proscriptions of Canadian law.

On October 11, 1977, the court had ordered GAC to secure a waiver of the Canadian nondisclosure laws in order to produce the documents. It also ordered GAC to "separately, clearly and definitively" identify the documents.

On October 13, 1977, GAC consulted Canadian counsel on the appropriate way to secure a waiver. It was in-

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trary, which, with the exceptions noted herein, we have found to be supported by the record. We also take note of the following factors in the Tenth Circuit's opinion which find no parallel here—(1) the discovery at issue was "in a sense cumulative" (563 F.2d at 999); (2) the case did not involve the enforcement of antitrust laws (*id.*); and (3) Rio Algom was not a party in the litigation, had not sought affirmative relief from the court, and therefore, was not in a position to profit from its failure to comply with the production orders. *Compare Societe*, 357 U.S. at 212. *See also* n. 125, *infra*.

formed that only the Canadian Minister of Energy, Mines and Resources could grant a waiver. On the same date, GAC wrote to the Minister requesting permission to produce the cartel documents in Canada and to identify the documents *with* a summary of their contents. On October 19, 1977, the Canadian Minister rejected GAC's request of October 13 for a waiver of the Regulations, and he refused to give permission to identify the documents "in the manner" GAC had described. United then moved on November 4 for sanctions for GAC's failure to produce the documents and to compel identification of the documents *without* a summary of contents. Four days later, GAC sent a second letter to the Minister, requesting permission to so identify the documents.

On the following day, the Supreme Court of Ontario handed down a decision upholding the validity of the Uranium Information Security Regulations. *Joe Clark* v. *Attorney General of Canada*, 17 Ont. 2d 593 (1977). However, the court struck down the portion of the Regulations which permitted the Minister to consent to the release of the documents. Accordingly, on December 6, the Minister informed GAC that in light of the court's decision, he was "not able to consider your request." GAC subsequently refused to produce or to in any way identify any of the cartel documents located in Canada.

On December 27, the trial court stated that it was not satisfied that simple identification of the documents was prohibited by Canadian law. GAC did not present further evidence on the issue.[122]

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[122] On February 22, 1978, GAC suggested that the court and counsel for appellees meet with Canadian officials. Both the court and counsel refused. On the day after the default judgment was entered, GAC met with officials of the Government in Canada. GAC gave the court a report of that meeting, which stated that officials of the Canadian Department of Energy, Mines and Resources had informed GAC's representatives that there was no possibility that release of the cartel documents would be permitted by the Canadian

The trial court found that GAC's efforts to secure a waiver were not only insufficient, but also, were deliberate attempts to avoid producing or identifying the documents. First, the court found that it was improper for GAC to request permission to identify the documents *with* a summary of contents, as it did in its original letter of October 13, because the court's order of October 11 did not call for such identification. Second, the court found that GAC's second letter of November 8 requesting permission to identify the documents *without* a summary of contents was written to the Minister with the knowledge that he did not have authority to interpret the Uranium Information Security Regulations. Third, the court construed the Regulations to permit simple identification of the documents. Fourth, the court found that GAC had failed to comply with the court's order to so identify the documents. Fifth, the court found that GAC's only effort, until late February 1978 (*see* n. 122, *supra*), to secure a waiver of the Regulations in order to produce the documents was to write the original letter of October 13. The court stated that writing "a simple letter" to an official who has been declared by the Canadian courts to have no power to interpret the Regulations did not constitute a good faith effort to secure the release of the documents. The court suggested that GAC,

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Government, and that, in the opinion of the officials, simple identification of the documents without a summary of their contents was also prohibited by Canadian law. One official stated that no Canadian court had decided the latter issue, although it was the Government's intention that such identification be prohibited. However, in a Diplomatic Note sent to the United States on March 15, 1977, the Canadian Government stated that "[t]he interpretation of the Regulations, including a determination of their scope, is a matter for Canadian courts." Prior to entry of the default judgment on March 2, no Canadian court had addressed the question of the propriety of a simple identification of the documents, nor had GAC made any attempt to have a Canadian court decide the question.

Gulf and Gulf Canada should have entered into negotiations with the Canadian Government to secure the documents.

We do not completely agree with these findings. First, GAC's original request to identify the documents with a summary of contents was not unreasonable, although the court's order of October 11 did not call for identification in that manner. United's Second Set of Interrogatories defined the term "identify" to include a summary of the contents of the documents. At a hearing on September 9, the court stated that if the documents were produced, GAC did not need to summarize their contents. The Canadian cartel documents were not produced; therefore, it was understandable that GAC asked for permission to identify them in the manner described in the interrogatories themselves.[123]

Second, GAC could not have written its second letter to the Canadian Minister with the knowledge that he had no power to either consent to a waiver of the Regulations or to construe them, because it was not until the day after that letter was sent that a Canadian court struck down the provision giving the Canadian Minister the authority to grant a waiver.

Third, although we do not necessarily disagree with the court's interpretation that the Regulations permit simple identification of the cartel records, such identification is not an adequate substitute for production of the documents themselves. We cannot perceive how identification which does not draw upon the contents of the documents could have significantly assisted either the court or appellees.

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[123] However, as we have previously noted, as of the hearing on September 9, GAC had still not informed the court that it would not be able to produce all documents responsive to the Second Set of Interrogatories.

Fourth, GAC concededly did not comply with the court's orders of November 18 and December 27 to make a simple identification of the documents. Although GAC might have taken further steps to ascertain the legality of making such an identification, in light of the time constraints imposed on it and the limited utility of such identification, we cannot agree that its failure to take such steps either constituted bad faith or prejudiced the rights of appellees.

The court's final recital on the issue of efforts to secure a waiver is, however, essentially correct. GAC did not make any effort to secure the actual production of the documents other than its letter of October 13 to the Canadian Minister. Although it was extreme to say that GAC's failure to make additional efforts demonstrated an "intent to conceal" evidence concerning the cartel, GAC's efforts were nevertheless inadequate in at least three respects.

First, GAC was under a duty to make every effort to obtain the requested information, *Jackson* v. *Kroblin Refrigerated Xpress, Inc.*, *supra*, 49 F.R.D. at 137, which included making all efforts to secure a relaxation of the foreign nondisclosure laws to the maximum of its ability. *Societe Internationale* v. *Rogers*, *supra*, 357 U.S. at 205. This obligation arose no later than when the court ordered GAC to answer the Second Set of Interrogatories and to produce cartel documents; it did not originate with the court's order of October 11. It is undisputed that prior to October 13, GAC had made no efforts whatsoever to secure the release of the documents located in Canada. *Compare State of Ohio* v. *Crofters, Inc.*, *supra*, 75 F.R.D. at 21.

Second, GAC's letter of October 13 to the Canadian Minister did not constitute an effort to the maximum of its ability. GAC's letter was similar to a letter Rio Algom had written to the same Minister on June 23,

1977, requesting permission to comply with the subpoenas for cartel records issued in the *Westinghouse* case. Rio Algom's request had been denied by the Minister on July 19, 1977. GAC was aware of Rio Algom's letter and of the results it achieved. In writing this Minister, GAC chose an avenue which it knew would be to no avail.[124]

Finally, even if the letter of October 13 was a good place to start, as GAC had been advised by Canadian counsel, it was not the proper place to stop. Even if, as is now apparent, the Canadian Government's position on the subject is completely inflexible, GAC's lack of effort after October to secure the documents does not comport with the command that a party make "every effort," or efforts to the maximum of its ability, to secure the information it has been ordered to produce. Taken alone, GAC's inaction is not very significant because it has subsequently become clear that further actions would not have been more successful.[125] However, the court could properly consider this conduct as part of the totality of circumstances surrounding GAC's approach to its discovery obligations.

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[124] GAC contends that this letter was sufficient because the Tenth Circuit had held on October 11 that Rio Algom's letter was an adequate attempt to secure a waiver. *In Re Westinghouse Elec. Corp. Uranium, Etc., supra*, 563 F.2d at 999-1000. However, when Rio Algom wrote on June 23 it did not know what GAC was aware of on October 13—that the Minister would not consent to the release of the documents.

[125] In addition to the Canadian Minister's refusals to grant waivers to Rio Algom and GAC, Canadian courts have refused to enforce letters rogatory to secure the cartel records. *See In the Matter of the Evidence Act*, R.S.O. 1970, c. 151 (*and In Re Westinghouse Electric Corporation Uranium Contracts Litigation*), 16 Ont. 2d 273 (1977); *Joe Clark* v. *Attorney General of Canada*, 17 Ont. 2d 593 (1977); *Gulf Oil Corp.* v. *Gulf Canada Ltd.* (Sup. Ct. of Canada, slip op. March 18, 1980). *See also In Re Uranium Antitrust Litigation, supra*, 480 F.Supp. at 1155.

The final aspect of *Societe* which is relevant to the propriety of the default sanction imposed on GAC for its failure to produce cartel documents concerns the trial court's finding that Gulf had followed a conscious and deliberate policy of housing the cartel documents in Canada, rather than in the United States; and that this action amounted to deliberately courting legal impediments to the production of the records. GAC contends that the recital is improper not only because it did not pursue such a policy, but also, because it was denied a hearing on the allegations that it did.

In *Societe*, the Supreme Court stated that if a party, who failed to comply with a court order to produce documents whose production was proscribed by foreign law, had attempted to take advantage of that foreign secrecy law, and thus, had "deliberately courted legal impediments to production of the . . . records," this fact would have "a vital bearing on justification for dismissal of the action" under Rule 37(b). 357 U.S. at 208-09.

United first raised this issue on September 30, 1977 in support of its motion for sanctions and for supplemental answers to its Second Set of Interrogatories. United asked that inferences of fact be drawn against GAC because of the policy of keeping documents in Canada. GAC did not respond to these charges, nor did it offer evidence to refute them. The trial court did not make any findings regarding the housing allegation in its order of October 11.

After GAC informed the court that the Canadian Minister had refused to waive the proscriptions of the Uranium Information Security Regulations, United moved on November 4, 1977, for sanctions for GAC's failure to produce Canadian cartel documents. In a supporting memorandum of the same date, United again raised the housing allegation.

The trial court set November 14 as the date for a hearing on United's motion. The court suggested that an evidentiary hearing might be required. GAC stated that with the exception of one witness, it was prepared to present its side on affidavits alone. United stated that it would rely "on affidavits and deposition references." The court ordered the parties to submit their affidavits by November 11. Neither United nor GAC filed affidavits on that date concerning the housing question.

At the hearing on November 14, a GAC attorney testified on various GAC discovery efforts. However, GAC again did not present any evidence on the housing question.

At the continuation of the hearing on November 16, United's counsel sought to admit into evidence in connection with its motion for sanctions references from Gregg's deposition in the *Westinghouse* litigation. United had quoted these references in the hearing on October 7 and in the memorandum in support of its November 4 motion. GAC objected, claiming surprise because United had not submitted affidavits on the housing issue by the November 11 deadline. The court indicated that it agreed with GAC, but when United's counsel pointed out that the references were quoted in its memorandum, GAC's counsel withdrew the objection and stipulated to the admission of the four references from the Gregg deposition "for purposes of this motion."

On November 18, the court found that GAC's previous failures to produce cartel records were due in part to "its own early and deliberate policy of housing such documents in Canada." In December 1977, GAC moved to vacate the order of November 18. However, it presented no evidence to refute the finding that it had stored cartel documents in Canada. This motion was denied.

Not until three days after United's final motion for sanctions was filed in February 1978, did GAC offer

evidence on the question of whether either it or Gulf had pursued a policy of housing cartel documents in Canada. GAC asked for another evidentiary hearing on that question. The court denied this request.

GAC now contends that its constitutional right to due process was denied by the failure to conduct a hearing on the housing issue. We disagree.

GAC had adequate notice that United was relying on the housing allegation in support of its November 4 motion for sanctions. Not only did United's supporting memorandum expressly make this allegation, with specific references to Gregg's deposition, but also, on November 7 the court had listed the subject of "the effort to get away with the Canadian law" as a subject for consideration at the hearing on November 14. In a brief filed with the court on November 14, GAC recognized that "[m]ost of [United's] argument in its memorandum brief in support of its Motion" for sanctions was based on the housing allegation. GAC said that that matter had been settled by the court's order of October 11, which was untrue since the order did not even mention that issue. GAC said that it would "therefore not respond to those arguments," except to note that *it*, unlike Gulf Canada, had no documents in Canada. Thus, GAC had ample notice that United was relying on the housing allegation; it simply did not respond.

The record establishes that GAC's counsel not only stipulated to the admission of Gregg's testimony, but failed to take advantage of several opportunities to present evidence to contradict it.[126] Under such circum-

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[126] When the court agreed to consider Gregg's testimony "for purposes of this motion," it invited GAC to submit a brief on the subject. GAC did not. On the day following the hearing, GAC wrote to the court, stating its understanding that the November hearing was limited to the question of whether it had complied with the court's order of October 11 to secure a waiver. However, it enclosed materials which it said bore on United's other contentions, but none of the submissions were related to the housing issue.

stances, GAC was not deprived of an evidentiary hearing on the housing allegation. As the court said in *Satterfield* v. *Edenton-Chowan Bd. of Ed.*, 530 F.2d 567, 572 (4th Cir. 1975): "[W]hen this opportunity [to be heard] is granted a complainant, who chooses not to exercise it, that complainant cannot later plead a denial of procedural due process." (Footnote omitted.) *See also Birdwell* v. *Hazelwood School District*, 491 F.2d 490, 495 (8th Cir. 1974).

We turn now to an examination of the evidence in the record on the housing issue, and the applicable principles of law in this regard. In the deposition references whose admission was stipulated to by GAC at the November hearing, Gregg testified that he and Ediger, the head of Gulf Canada, "had an understanding" that "anything that I sent to the United States would be with his approval, and I did not send anything of this type down there." He also stated that there was an understanding that "we should minimize, to the greatest extent possible, sending any of this type of material down." Gregg testified that the subject of "concealing" information on cartel activities had been discussed at "great length" in a meeting at which "a large number of lawyers [were] present," and that it was agreed "not to send anymore across the border than absolutely necessary." This testimony, which is consistent with other evidence in the record,[127] constitutes substan-

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[127] In his deposition in this case, Gregg testified that Allen of Gulf Minerals sent cartel materials to Canada from Denver because "he thought it was material that was best kept in Canada or better kept in Canada." In testimony before the Congressional subcommittee, Gregg was asked if there was any reason other than "the need for secrecy" that those materials were "better kept" in Canada. He replied: "None that I can think of." *Hearings on International Uranium Cartel, supra*, Serial No. 95-39, p. 271. Hunter was asked in his deposition in this case if one of the reasons Gregg was transferred to Canada was "the concern about the antitrust laws of the United States." He replied: "Concern about all the documentation that would flow out of any implementation of the Johannesburg agreement and the desirability of having that out—non-U.S., in the Canadian subsidiary."

tial evidence to support the trial court's finding that Gulf followed a policy of housing cartel documents in Canada.

GAC contends that although cartel documents were kept in Canada, this policy did not amount to the prohibited conduct of "courting legal impediments" to the production of the records. It argues that GAC did not keep such documents in Canada. It also contends that these records were Gulf Canada's, and that it was a normal business practice for Gulf Canada to keep those records at its headquarters in Canada. GAC maintains that the records were kept in Canada before the promulgation of the Uranium Information Security Regulations, and thus, neither it nor Gulf could have been courting legal impediments prior to the enactment of such impediments. It further contends that the documents were kept in Canada long before any foreseeable litigation arose, and thus, Gulf had not been taking unusual actions motivated by a desire to frustrate such litigation. Finally, GAC contends that the presence of many cartel records in this country refutes the notion that Gulf followed an illicit policy of housing them in Canada.

The evidence we have reviewed demonstrates that Gulf's policy of keeping cartel records in Canada was motivated in large part by an unusual concern for secrecy, and thus, was not just a normal business practice. Although Gulf Canada's headquarters are in Canada, many officials of Gulf from the United States participated in meetings of the cartel (e.g., Hunter, Hoffman, Allen, Zagnoli). At the important Johannesburg cartel meeting in May and June 1972, three of Gulf's four representatives were from the United States.

Although the Uranium Information Security Regulations were not in effect during the period the cartel was apparently in existence, the Ontario Business Records Protection Act was in effect. Although that Act is not a significant impediment to discovery, it was relied on by

GAC in the court below as a total bar to the discovery of cartel records. If documents were housed in Canada with the expectation that the Ontario Act would be applicable, it is largely immaterial that the expectation was later realized in the form of a different secrecy law. When a party places documents outside this country with the expectation that production of those documents will be frustrated in litigation here, the strong policy in favor of broad discovery dictates that that party bear the consequences of the dilemma created by the realization of its expectations.

It is not required that the actual litigation in which the documents are ordered produced must be either pending or contemplated at the time the housing policy is initiated and followed. In *Societe*, the Court suggested that an attempt to take advantage of foreign secrecy laws *before* the United States entered World War II would have "a vital bearing" on litigation which commenced many years later under the Trading with the Enemy Act. The evidence demonstrates that Gulf was very concerned about possible liability under American antitrust laws resulting from its participation in the cartel. *See* n. 127, *supra*, and Section II C(1), *supra*.

We hold that GAC was not deprived of its right to notice of, and a hearing on, the housing allegations against it and Gulf. We also hold that there is substantial evidence to support the court's finding that Gulf followed a deliberate policy of storing cartel documents in Canada, and that this policy amounted to courting legal impediments to their production. Under *Societe*, these findings alone may be the basis for the imposition of such a discovery sanction as a default judgment.

(3) *The Snyder and Grand Jury Documents*

The last two recitals of bad faith we examine concern documents which, for the most part, GAC did not pro-

duce until after the commencement of the trial. These documents consisted of two categories—the so-called Snyder and Grand Jury documents.

The term Snyder documents refers to a group of documents Gulf produced in another case involving the cartel. In that case, Westinghouse subpoenaed certain documents concerning the cartel from Gulf. Gulf claimed that the documents were subject to the attorney-client privilege. In mid-August 1977, United States District Judge Daniel J. Snyder, Jr. held that many of the documents were not privileged, and ordered that they be turned over to Westinghouse. However, Judge Snyder maintained a confidentiality order prohibiting their disclosure to outsiders. *In Re Westinghouse Elec. Corp., Etc.*, 76 F.R.D. 47 (W.D. Pa. 1977).

The trial court in this case found that (1) GAC wrongfully failed to inform it and the opposing parties of Judge Snyder's rulings of August 1977; (2) GAC never accurately disclosed to the court or to United the existence of all the Snyder documents; (3) these documents were called for by the First Set of Interrogatories, but the existence of most of them was not disclosed in this case until over a year after the interrogatories were filed; (4) the existence of some of the documents was not disclosed until after Judge Snyder held them to be public and not subject to claims of privilege; and (5) some of the documents were not identified or produced until after United brought the matter to the attention of the trial court in October 1977. The trial court concluded that GAC's failure to reveal the existence of, and to identify, the Snyder documents in a timely manner was a deliberate attempt to conceal relevant evidence.

As we have previously discussed, documents such as these were called for by the First Set of Interrogatories. Further, on January 11, 1977, the court had specifically ordered the production of such documents, and had set

a deadline of April 15, 1977, for complete production or the submission of those documents as to which GAC was claiming a privilege to the court for an *in camera* review.

By April 1977, GAC had produced only a few of the Snyder documents. It had claimed a privilege on many others, but had not submitted any of the documents for an *in camera* review by the April 15 deadline. It was not until late August 1977, that GAC listed twelve of the documents on a privilege list. GAC did not submit the documents as to which its claim of privilege had been challenged for an *in camera* review until September 16, 1977—five months after the deadline for their submission, over two weeks after the deadline for the completion of all discovery, and six weeks before the scheduled commencement of the trial.

On October 5, 1977, the court upheld GAC's claim of privilege in many of the instances in which it had been challenged. The remaining documents were turned over a week later. On October 7, 1977, United raised the question of the Snyder documents, stating that it had received only a few, despite Judge Snyder's rulings in August that many of the documents were not privileged. On October 11, the court held that documents deprivileged by another court were not subject to a claim of privilege in this case. On October 20, GAC produced the documents Judge Snyder had held were non-privileged, including documents which the court in this case had held to be privileged. On October 28, Judge Snyder ordered Gulf to produce the remaining documents he had not previously ruled on. On November 7—eight days after the trial commenced—GAC produced all of the remaining Snyder documents.

We cannot agree in all respects with the court's recital on the production of the Snyder documents. The court was incorrect in ruling that Judge Snyder had made the documents public; although produced to Westing-

house, the documents were still subject to a confidentiality order. The court also erred in faulting GAC for its failure to bring Judge Snyder's August order to its attention, since the court had stated prior to October 11 that it would not be bound by other judges' rulings on claims of privilege. Despite these errors, however, the court's conclusion that GAC did not fulfill its obligation to make full and complete discovery of the Snyder documents in a timely fashion is not manifestly erroneous.

GAC did not identify all of the documents in a timely manner. It did not submit the documents as to which it claimed a privilege for an *in camera* review until long after the date set for their submission. By failing to submit them until after the completion of the period set for discovery, appellees were effectively precluded from using the documents during depositions of key individuals taken during the summer of 1977. GAC's excuse for these delays is that discovery was an on going process which took a great deal of time. However, the court had made it clear throughout 1977 that adherence to the deadlines it set was a matter of considerable importance. After GAC failed to produce Gulf's records in response to United's original discovery requests, the court had ordered production of them to commence on January 24 and to continue diligently thereafter. Instead of producing the documents, GAC continued to reargue the production of partner records, despite several previous rulings on that subject. It waited until March 1977 to begin production of Gulf's records. The consequences which flowed from GAC's inability to comply with the court's orders in a timely fashion were self-inflicted wounds.

The second group of documents consisted of records Gulf produced to the federal grand jury. The trial court found that GAC had in bad faith failed to reveal the existence of these documents to the court or the other

parties until after United learned of their existence from a third party and had made a demand on GAC for them. The facts concerning these documents are largely uncontested; the only issue is the correctness of the trial court's conclusion that GAC had acted in bad faith with respect to their production.

When these documents were produced to the grand jury in January 1978, copies were apparently sent to GAC's counsel in Santa Fe, but they were not turned over to the court or the opposing parties. United filed a demand for them on February 15, 1978, after learning of their existence from Westinghouse.

GAC contends that it did not act in bad faith because it was still reviewing the documents at the time United filed its demand, and that it turned them over before completing its review. It contends that in view of the constraints involved in reviewing the documents while the trial was continuing, it acted as expeditiously as possible.

The trial court's finding on this subject was not erroneous. On October 7, 1977, GAC's counsel represented to the trial court that "every document that is available in the United States that are responsive to [the Second Set of Interrogatories] has been produced." That representation could not be made in good faith at a time when a file search was continuing. *Compare Armour & Co.* v. *Enenco, Inc., supra*, 17 F.R. Serv. 2d at 515 and 519. When the documents were sent to Santa Fe, GAC could have informed the trial court and opposing counsel that it was reviewing additional material; however, it did not. These documents were called for by United's first discovery requests. Their production had specifically been ordered as early as January 1977, over a year before they were eventually produced. "Such a dilatory response . . . hardly bespeaks of the good faith compliance which [defendant] repeatedly asserts." *State of*

Ohio v. *Crofters, Inc., supra,* 75 F.R.D. at 19. *See also Perry* v. *Golub, supra,* 74 F.R.D. at 365; *Von Brimer* v. *Whirlpool Corporation,* 362 F.Supp. 1182, 1186 (N.D. Cal. 1973), *aff'd,* 536 F.2d 838 (9th Cir. 1976); *Armour & Co.* v. *Enenco, Inc., supra,* 17 F.R. Serv. 2d at 515-16. Under these circumstances, it was reasonable for the trial court to conclude that GAC's actions as to the production of these documents were improper. *See generally Link* v. *Wabash Railroad Co.,* 370 U.S. 626, 634-35, n. 11 (1962).

If GAC's conduct with regard to the production of the Snyder and Grand Jury documents were the only matters at issue, we might take a different view. But they are just two instances to be considered in the pattern of intransigence which characterized GAC's actions during discovery. *DiGregorio* v. *First Rediscount Corporation,* 506 F.2d 781, 787 (3rd Cir. 1974). *See also Link* v. *Wabash Railroad Co., supra,* 370 U.S. at 634; *Diapulse Corporation of America* v. *Curtis Publishing Co., supra,* 374 F.2d at 446; *Riverside Memorial, Etc.* v. *Sonnenblick-Goldman,* 80 F.R.D. 433, 436 (E.D. Pa. 1978), *aff'd mem., Riverside Memorial Mausoleum, Inc.* v. *Umet Trust,* 605 F.2d 1196 (3rd Cir. 1979), *cert. denied,* 100 S.Ct. 1022 (1980). In light of the full record, the trial court did not err in reaching the conclusions it did regarding the production of these two categories of documents.[128]

With the few exceptions we have noted, the recitals of the trial court on GAC's bad faith conduct during

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[128] I&M asserts that GAC and Gulf produced various cartel documents in other litigation subsequent to the entry of the sanctions order and default judgment in this case which it had not produced here, including certain documents from Canada, which it had determined were not covered by the Uranium Information Security Regulations, and various cartel documents from Gulf files in the United States, Japan and Switzerland. Because these matters are not of record in this case, we have not considered them.

discovery are supported. Considering the full record, we do not have the " 'definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors' " that is required to reverse the judgment. *Wilson* v. *Volkswagen of America, Inc., supra*, 561 F.2d at 506. Although we do not agree with a few of the recitals, the conclusion that the trial court reached—that GAC acted in bad faith and that this misconduct precluded a full and fair trial of the issues in the case—was not manifestly erroneous; indeed, it is compelled by an exhaustive review of the record.

B.

Requirements of Notice and Hearing on Discovery Failures

GAC argues that the trial court's findings that it had acted in bad faith during discovery, and the sanction of a default judgment which followed from those findings, could not have been entered without prior, specific notice of, and an evidentiary hearing on, the allegations against it. GAC contends that the trial court's refusal to conduct such a hearing, at which the parties would have had an opportunity to present live testimony and cross-examine witnesses, amounted to a denial of due process under Article II, § 18 of the New Mexico Constitution and the Fourteenth Amendment of the United States Constitution.

In Section III A, *supra*, we discussed the adequacy of the notice and hearing afforded on the question of whether GAC and Gulf had followed a policy of housing cartel documents in Canada. In this section, we discuss the notice and hearing issues as they relate to all the other recitals on GAC's discovery failures.

GAC requested an evidentiary hearing on February 13, 1978, in response to United's motion for a default

judgment. In the sanctions order and default judgment, the court stated that the factual basis for imposing sanctions for GAC's bad faith "manifestly appear[s] from the face of the record . . ., without any need or requirement for an evidentiary hearing." GAC renewed its request for an evidentiary hearing in connection with its March 13 motion for reconsideration of the sanctions order and default judgment. This motion was denied. Both of GAC's requests for an evidentiary hearing were accompanied by numerous affidavits from its attorneys and officers attesting to the good faith of their approach to discovery.

GAC was on notice long before the sanctions order and default judgment was entered that its conduct in discovery was at issue, that the court considered many of its actions improper and unresponsive, and that the court would consider the imposition of sanctions under Rule 37, including a default judgment, for further discovery failures. *See generally Riverside Memorial, Etc.* v. *Sonnenblick-Goldman, supra,* 80 F.R.D. at 436; *G-K Prop.* v. *Redevelop. Agcy. of City of San Jose, supra,* 409 F.Supp. at 959-60; *In Re Professional Hockey Antitrust Litigation,* 63 F.R.D. 641, 656 (E.D. Pa. 1974), *rev'd,* 531 F.2d 1188 (3rd Cir. 1976), *rev'd, National Hockey League* v. *Met. Hockey Club,* 427 U.S. 639 (1976). At least five times before it entered the default judgment, the trial court had warned that appropriate sanctions would be imposed for the failure of GAC or either partner thereof to comply with its discovery orders. In March 1977, it warned that it would "look long and hard" at a motion for a default judgment if there was a failure to make good faith discovery. Prior to March 1978, the trial court had found GAC's conduct in discovery deficient on at least four occasions. Under these circumstances, GAC will not now be heard to say that it did not foresee the consequences of its discovery

failures. *Compare Link* v. *Wabash Railroad Co., supra,* 370 U.S. at 636 *and Asociacion de Empleados, Etc.* v. *Rodriguez Morales,* 538 F.2d 915, 917 (1st Cir. 1976).

The other aspect of GAC's attack upon the procedures by which the judgment was entered—the lack of an evidentiary hearing—is also without merit. There is no requirement under Rule 37(b) that an evidentiary hearing be held before sanctions are imposed. *See Norman* v. *Young,* 422 F.2d 470, 474 (10th Cir. 1970). Under our rules, a court may decide motions on the basis of affidavits, oral testimony or depositions. N.M.R. Civ. P. 43(e), N.M.S.A. 1978 (current version at N.M.R. Civ. P. 43(c), N.M.S.A. 1978 (1980 Repl. Pamp.)). Evidentiary hearings in cases involving the imposition of discovery sanctions have been required under some, but not all circumstances. *Compare Flaks* v. *Koegel,* 504 F.2d 702, 712 (2nd Cir. 1974) *and McFarland* v. *Gregory,* 425 F.2d 443, 450 (2nd Cir. 1970) *with Margoles* v. *Johns,* 587 F.2d 885, 888-89 (7th Cir. 1978) *and Norman* v. *Young, supra.*

In a previous opinion in this case, we considered the question of the circumstances under which a trial court is required to hold an evidentiary hearing. In *United Nuclear Corp.* v. *General Atomic Co., supra,* 93 N.M. at 123-24, 597 P.2d at 308-09, we rejected GAC's argument that the trial court erred in failing to hold an evidentiary hearing on GAC's motion to stay the proceedings pending arbitration. We noted that the critical question is "what type of hearing is 'appropriate to the nature of the case.'" *Id.* at 123, 597 P.2d at 308 (citation omitted). The following general principles, set forth in our earlier decision, are equally applicable here:

> The requirements of due process are not technical, and no particular form of procedure is necessary for protecting substantial rights. The circumstances of the case dictate the requirements. The integrity of

> the fact-finding process and the basic fairness of the decision are the principle considerations.

Id. (citations omitted).

GAC's failures to make good faith discovery are "mirrored in the record." *In Re Liquid Carbonic Truck Drivers Chemical, Etc., supra,* 580 F.2d at 822; *DiGregorio* v. *First Rediscount Corporation, supra,* 506 F.2d at 788; *Norman* v. *Young, supra,* 422 F.2d at 474. The initial, self-serving misconstruction of the scope of the First Set of Interrogatories, the unjustified failure to include cartel information in the supplemental answers to those interrogatories, the contradictory representations GAC made to the trial court at various stages of the proceedings, the series of inadequate answers to the Second Set of Interrogatories, and the unfulfilled commitments to produce cartel documents, are all apparent from the face of the record. No amount of oral testimony could alter those aspects of the history of this litigation.

Further, the affidavits GAC filed on February 13 and March 13, 1978, in connection with its request for an evidentiary hearing did not demonstrate any need for such a hearing. Rather, portions of those affidavits are themselves evidence of the lack of good faith on GAC's part. For example, the Ross affidavit of February 13, which stated that GAC understood its obligation under the First Set of Interrogatories to include the furnishing of at least some records in the custody of the partners, contradicted the March 13 affidavits of five GAC attorneys stating that they understood that only documents in the possession of GAC were required. One of the March 13 affidavits contained the assertion that United's allegation that documents in Gulf's possession were required was "patently false," which was rather startling in light of the Ross affidavit and the fact that *some* information from Gulf was provided in GAC's original answers to

the First Set of Interrogatories. The trial court afforded these contradictory sets of affidavits the weight to which they were entitled.

Even if GAC's representations of February and March 1978 concerning its understanding of the scope of its obligations had been consistent, they would not have established that it had acted in good faith nor would they have demonstrated the presence of factual issues to be resolved at an evidentiary hearing. The undisputed fact is that without objecting to the interrogatories, without disclosing its understanding of its obligations to opposing counsel, and without seeking guidance from the court, GAC made a unilateral, self-serving construction of the scope of the interrogatories. "The wording of the interrogatories and answers themselves would not lead to any other reasonable conclusion." *Hunter* v. *International Systems & Controls Corp., supra,* 56 F.R.D. at 625 (footnote omitted). It is no defense to say that GAC simply made an innocent mistake of law in determining that information and documents in the possession of the partners were not subject to discovery under Rules 33 and 34. *Compare Unger* v. *Los Angeles Transit Lines,* 180 Cal. App. 2d 174, 4 Cal. Rptr. 370, 378 (Ct. App. 1960). As we have previously noted, the rules call for such a question to be presented in advance to the court for its determination.

The affidavits GAC submitted concerning its failure to provide information on the cartel in its supplemental answers to the First Set of Interrogatories similarly failed to present any factual issue as to the good faith of this failure. In one affidavit, a GAC attorney stated that he did not consider the cartel to be an issue when the supplemental answers were filed in April 1977, and only appreciated that it had become "a significant issue" when United filed its Second Set of Interrogatories on August 16, 1977. However, on March 25, 1977, almost three weeks before the supplemental answers were filed, this same

attorney had objected in the presence of the trial court to United's "continual reference to the so-called international uranium cartel." In a second affidavit the GAC attorney who prepared the supplemental answers to questions 30-34 of the First Set of Interrogatories stated that no information on the cartel was provided in those answers because the cartel was not mentioned in United's complaint or in the interrogatories, and therefore, had not yet been raised as an issue. We have previously reviewed the evidence which contradicts these assertions or demonstrates the unreasonableness of them.

Finally, these affidavits did not create an issue as to the trial court's finding that GAC had, in bad faith, concealed the existence of the cartel and Gulf's participation in it. It was permissible for the trial court to conclude that GAC's excuses for not producing cartel information early in the litigation were inadequate. And it could reasonably be inferred from GAC's conduct in various aspects of the proceedings throughout the course of this litigation, as well as from the nature of the cartel evidence that was eventually made available, that GAC had deliberately concealed cartel information. *Compare Link* v. *Wabash Railroad Co., supra,* 370 U.S. at 633.

Even if GAC's failure to provide information on the cartel in response to the First Set of Interrogatories was not the product of a calculating, illicit attempt to conceal damaging information, the record compels the conclusion that, at best, it could be characterized as "gross disregard for the requirements of the discovery process." *Armour & Co.* v. *Enenco, Inc., supra,* 17 F.R. Serv. 2d at 519. However, whether GAC's original failures to make cartel discovery were the result of a willful, intentional and bad faith attempt to conceal evidence, as the trial court found, or were due to a gross indifference to its discovery obligations, is immaterial. The willfulness required to sustain the severe sanctions of Rule 37(b)

(2) (iii) may be predicated upon either type of behavior. *See Rio Grande Gas Company* v. *Gilbert*, *supra*, 83 N.M. at 278, 491 P.2d at 166; *Cine Forty-Second St. Theatre* v. *Allied Artists*, 602 F.2d 1062, 1066-68 (2nd Cir. 1979); *Kozlowski* v. *Sears, Roebuck & Co.*, *supra*, 73 F.R.D. at 77; *Armour & Co.* v. *Enenco, Inc.*, *supra*. The two types of misconduct differ only in degree as to culpability, and they differ not at all in terms of the adverse effects that GAC's discovery failures have had on the due process rights of appellees and the integrity of the truth-seeking function of the trial court.

In conclusion, we note that the matters set forth in the recitals of bad faith were within the knowledge of the trial court. The parties had full opportunity to brief the facts and law regarding GAC's failures to make discovery, its lack of good faith, and the sanctions to be applied; they filed extensive briefs with the court prior to entry of the sanctions order and default judgment. Each side filed proposed findings, and GAC submitted numerous affidavits. "The briefs and affidavits fully recounted the circumstances surrounding the noncompliance with the court's order[s]." *Margoles* v. *Johns*, *supra*, 587 F.2d at 889. Therefore, the trial court did not err in failing to hold additional evidentiary hearings on GAC's conduct in discovery.

C.

THE BREADTH OF THE SANCTIONS FOR NON-COMPLIANCE

GAC contends that even if sanctions should have been entered under Rule 37 for its discovery failures, a default judgment on all issues was unconstitutionally overbroad. GAC makes two points in this regard. First, GAC contends that the trial court could have imposed lesser sanctions to resolve the problem of the nonproduction of cartel documents. Second, GAC argues that its discovery failures, particularly those relating to the cartel, did

not relate to all dispositive issues, and that a default judgment depriving it of a trial on the merits on other issues amounted to "mere punishment." We are not persuaded by either argument.

It is well-settled that the choice of sanctions under Rule 37 lies within the sound discretion of the trial court.[129] Only an abuse of that discretion will warrant reversal.[130] Although the severest of the sanctions should be imposed only in extreme circumstances,[131] "in this day of burgeoning, costly and protracted litigation courts should not shrink from imposing harsh sanctions where, as in this case, they are clearly warranted." [132] As one court stated:

> [W]hen a defendant demonstrates flagrant bad faith and callous disregard of its responsibilities, the district court's choice of the extreme sanction is not an abuse of discretion. It is not our responsibility as a reviewing court to say whether we would have chosen a more moderate sanction.

Emerick v. *Fenick Industries, Inc., supra,* 539 F.2d at 1381.

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[129] *Rio Grande Gas Company* v. *Gilbert, supra,* 83 N.M. at 278, 491 P.2d at 166; *Pizza Hut of Santa Fe, Inc.* v. *Branch, supra,* 89 N.M. at 328, 552 P.2d at 230; *Gallegos* v. *Franklin,* 89 N.M. 118, 122, 547 P.2d 1160, 1164 (Ct. App. 1976), *cert. denied,* 89 N.M. 206, 549 P.2d 284 (1976); *National Hockey League* v. *Met. Hockey Club,* 427 U.S. 639, 642 (1976); *DiGregorio* v. *First Rediscount Corporation, supra,* 506 F.2d at 788.

[130] *General Dynamics Corp.* v. *Selb Manufacturing Co.,* 481 F.2d 1204, 1211 (8th Cir. 1973), *cert. denied,* 414 U.S. 1162 (1974).

[131] *Emerick* v. *Fenick Industries, Inc., supra,* 539 F.2d at 1381; *Asociacion de Empleados, Etc.* v. *Rodriguez Morales, supra,* 538 F.2d at 917 (construing Fed. R. Civ. P. 41(b)).

[132] *Cine Forty-Second St. Theatre* v. *Allied Artists, supra,* 602 F.2d at 1068.

The trial court's conclusion that GAC acted in flagrant bad faith and callous disregard of its responsibilities is supported by the record. In light of the principle that the choice of sanctions "must be weighed in light of the full record in the case," [133] the trial court did not abuse its discretion in imposing the stringent sanction of a default judgment.[134]

First, we are unpersuaded by GAC's argument that the trial court should have attempted to resolve the problem of Canadian cartel documents by employing lesser sanctions. Although the severest of sanctions should be imposed only "when the court in its discretion determines that none of the 'lesser sanctions available to it,' would truly be appropriate," the court need not exhaust the lesser sanctions. *Asociacion de Empleados, Etc.* v. *Rodriguez Morales, supra*, 538 F.2d at 917 (construing Fed. R. Civ. P. 41(b)) (citation and footnote omitted). *See also Anderson* v. *Air West, Inc., supra*, 542 F.2d at 525 (construing Fed. R. Civ. P. 41(b)). GAC's argument rests on a premise we reject—that the discovery dilemma was not due in large measure to GAC's misconduct. But equally important, the lesser sanctions which GAC suggests could have been imposed were not commensurate with the nature of its misconduct, and were totally incapable of remedying the dilemma created by that misconduct.

GAC suggests three alternative means the court could have utilized—(1) an order to produce the Canadian cartel documents pursuant to an order of civil contempt carrying the sanction of a daily fine for disobedience; (2) an attempt to secure the documents by letters roga-

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[133] *Cine Forty-Second St. Theatre* v. *Allied Artists, supra*, 602 F.2d at 1068.

[134] *See Emerick* v. *Fenick Industries, Inc., supra*, 539 F.2d at 1381.

tory executed in Canada; or (3) the entry of preclusive findings under Rule 37(b)(2)(i) which were closely tailored to facts that could reasonably have been proven by the missing Canadian documents.

The trial court did not err in failing to employ any of these alternatives. Even GAC does not contend that a contempt citation would have secured the production of cartel documents located in Canada.[135] Further, such an order would have entailed a command to violate the nondisclosure laws of a foreign state, something the trial court repeatedly, expressly, and properly refused to do. The second alternative, letters rogatory, was equally unavailing, as GAC itself recognized,[136] and as subsequent events have proven. *See* n. 125, *supra*. The third alternative, closely tailored cartel findings, was met in this case. Without fully setting forth those findings here, it is enough to say that we are satisfied those findings were as closely tailored to the withheld information as was possible under the circumstances. After fully considering the entire record, "we are unable on review to hold that the trial court could have fashioned an equally effective but less drastic remedy." *Diaz* v. *Southern Drilling Corp.*, 427 F.2d 1118, 1127 (5th Cir. 1970), *cert. denied*, 400 U.S. 878 (1970).

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[135] Other courts have also found a contempt citation or fine to be an inappropriate or inadequate sanction for failure to make discovery. *See G-K Prop.* v. *Redevelop. Agcy. of City of San Jose*, *supra*, 409 F.Supp. at 959; *Perry* v. *Golub*, *supra*, 74 F.R.D. at 366; *Buehler* v. *Whalen*, *supra*, 374 N.E.2d at 467.

[136] On October 7, 1977, GAC's counsel informed the trial court:

> I don't find it all surprising that neither [United] nor [I&M] have tried to go this same course and seek out letters rogatory because it would be my conclusion that they would get exactly the same answers from the Canada Courts that Westinghouse did. . . . Westinghouse tried it and Westinghouse lost and I don't think the courts of Canada will change their mind.

The second aspect of GAC's argument that the sanction of a default judgment was inappropriate is based on the principle that the least restrictive alternative sufficient to protect the opposing party must be imposed. GAC contends that the default related only to the Canadian cartel documents, and that such information could not have been dispositive of every issue in the case. Therefore, it argues that an across-the-board default judgment amounted to "mere punishment," in contravention of settled principles of constitutional law. *Compare Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322 (1909) *with Hovey* v. *Elliott*, 167 U.S. 409 (1897). This argument is also without merit.

When a party takes a cavalier approach to its discovery obligations, as GAC did in this case, the entry of a default judgment is an appropriate sanction. Upon the default, the allegations of the complaint are taken as true. *Gallegos* v. *Franklin*, *supra*, 89 N.M. at 123, 547 P.2d at 1165.

A position similar to GAC's was rejected in *Trans World Airlines, Inc.* v. *Hughes*, *supra*. There the court said that the non-defaulting party "had no obligation to introduce any evidence whatever in support of the allegations of its complaint." The defaulting party, the court said, cannot escape liability for its bad faith approach to discovery by relying on evidence "which only *tends* to contradict the allegations of the complaint." The defaulting party must show that the evidence it relies upon "could not conceivably have been refuted and disproved . . . had there been a trial." 449 F.2d at 63. The court concluded:

> It would usher in a new era in the dynamics of litigation if a party could suffer a default judgment to be entered against it and then go about its business as if the judgment did not exist and as though, despite the opportunities to comply with the court's

> orders and to defend on the merits which had been ignored, the slate was wiped clean and a new day had dawned. To state the proposition is to expose the folly of it.

Id. at 63-64.

GAC was not defaulted merely because of the prejudice caused to the opposing parties by its failure to produce Canadian cartel records. The default judgment was entered as a result of a course of misconduct in discovery which began at the very outset of the case and ended only with the entry of that judgment. Although it is settled that discovery sanctions cannot be entered as "mere punishment," all such sanctions involve an element of punishment. *Norman* v. *Young*, *supra*, 422 F.2d at 474. As the court stated in *Buehler* v. *Whalen*, *supra*, 374 N.E.2d at 467:

> Our discovery procedures are meaningless unless a violation entails a penalty proportionate to the gravity of the violation. Discovery for all parties will not be effective unless trial courts do not countenance violations, and unhesitatingly impose sanctions proportionate to the circumstances.

It is "[o]nly where the sanction invoked is more stern than reasonably necessary" that a denial of due process results. *DiGregorio* v. *First Rediscount Corporation*, *supra*, 506 F.2d at 789. In light of the nature of GAC's misconduct, the element of punishment involved here does not rise to the prohibited level of reprisal. *Id.* *See also Norman* v. *Young*, *supra*, 422 F.2d at 474.

A party cannot approach its obligation to make good faith discovery however it chooses as to certain matters, and at the same time expect to have the case proceed in a normal fashion as to other issues. *See Haney* v. *Woodward & Lothrop, Inc.*, 330 F.2d 940, 945 (4th Cir. 1964). At stake is not only the appellees' right to a fair trial on

the merits, but also, the integrity of the orders of the court. As the court in *Perry* v. *Golub*, *supra*, 74 F.R.D. at 365, stated:

> [T]he refusal of a party . . . to comply with an Order of the Court cuts substantially deeper than the question of prejudice to litigants and their attorneys. A basic tenet of our government of law is that a party is required to obey a Court order.

In imposing stringent sanctions to preserve this basic principle, "courts are free to consider the general deterrent effect their orders may have on the instant case *and on other litigation*, provided that the party on whom they are imposed is, in some sense, at fault." *Cine Forty-Second St. Theatre* v. *Allied Artists*, *supra*, 602 F.2d at 1066 (emphasis added and citations omitted). As the United States Supreme Court stated in *National Hockey League* v. *Met. Hockey Club*, *supra*, 427 U.S. at 643:

> [T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

See also Emerick v. *Fenick Industries, Inc.*, *supra*, 539 F.2d at 1381; *Perry* v. *Golub*, *supra*, 74 F.R.D. at 366-67.

We are fully aware of the severity of the sanctions imposed by the judgment we affirm. Our affirmance of that judgment should not be construed as a retreat from the principle that such discovery sanctions are to be imposed only in extreme cases and only upon a clear showing of willfullness or bad faith. That principle is well-established in this jurisdiction; it is universally recognized in American jurisprudence; and it is fundamental

to the constitutional right of due process. The length of this opinion and the months of study and consideration given to it are testimony to the trepidation with which we have approached the judgment in question.[137] In this extraordinary case, our review has been anything but cursory.

Although the sanctions of Rule 37(b)(2)(iii) are to be applied only in aggravated circumstances, they must nevertheless be available to a court in order to achieve compliance with its orders and to insure that a determination of a case on the merits is made only after a full, good faith disclosure of all relevant facts. We are not only concerned with the constitutional right of the defaulted party to an opportunity to be heard on the merits, but also, with the equally fundamental constitutional right of the party who seeks discovery to a hearing which is meaningful. When a party has displayed a willful, bad faith approach to discovery, it is not only proper, but imperative, that severe sanctions be imposed to preserve the integrity of the judicial process and the due process rights of the other litigants. *See In Re Liquid Carbonic Truck Drivers Chemical, Etc., supra,* 580 F.2d at 823; *Norman* v. *Young, supra,* 422 F.2d at 474.

We are also mindful of the magnitude of the relief afforded in this case. It is unprecedented in New Mexico. We cannot consider such a matter lightly.[138] While we must guard against the possibility that such an enor-

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[137] "Because dismissal is the most severe sanction available to a district court under rule 37, we are ever reluctant to affirm its invocation." *DiGregorio* v. *First Rediscount Corporation, supra,* 506 F.2d at 788.

[138] *Cf. Trans World Airlines, Inc.* v. *Hughes, supra,* 449 F.2d at 63 ("[I]t would appear that were less at stake in this litigation, the propriety of the default judgment would not have deserved the full discussion we have afforded it.")

mous judgment is improperly imposed by an impatient court, we must also recognize that with stakes so high, there is a concomitant possibility that parties will make less than full, good faith disclosure. Undue leniency would encourage recalcitrance by litigants with something to hide.[139]

The rules of discovery are as equally applicable to cases involving large sums as they are to small; and the obligation to comply with those rules in good faith and to obey the orders of the court is no less incumbent on the largest company than it is on the poorest citizen. Any contrary rule, or any special considerations in a billion dollar case, would be inimical to the most fundamental postulate of our legal system—that before the law, all stand equal.

IV.

DISQUALIFICATION OF UNITED'S COUNSEL

GAC contends that the trial court erred in denying its motion to disqualify United's counsel, the law firm of Bigbee, Stephenson, Carpenter & Crout, now known as Bigbee, Stephenson, Carpenter, Crout & Olmsted (hereinafter referred to as the Bigbee firm), and that all orders entered by the court subsequent to the filing of its disqualification motion—including the sanctions order

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[139] *Cf. Trans World Airlines, Inc.* v. *Hughes*, 332 F.2d 602, 615 (2nd Cir. 1964), *cert. denied*, 380 U.S. 248 (1965) (misconduct in discovery "is particularly intolerable in a large and complex litigation such as this one"); *Philadelphia Hous. A.* v. *American Radiator & S. San. Corp.*, 50 F.R.D. 13, 19 (E.D. Pa. 1970), *aff'd sub nom, Mangano* v. *American Radiator & Standard San. Corp.*, 438 F.2d 1187 (3rd Cir. 1971) (severe discovery sanctions are "particularly appropriate in complex antitrust litigation like that now before the Court where efficient and effective discovery procedures are essential to orderly adjudication"). *See also Harlem River Con. C. Inc.* v. *Associated G. of Harlem, Inc., supra*, 64 F.R.D. at 465.

and default judgment—are therefore invalid and must be reversed.

This issue first arose on February 23, 1977—almost fourteen months after the filing of the complaint in this case—when GAC suggested that the Bigbee firm would have to be disqualified if Gulf documents regarding its "separate non-partnership uranium activities in New Mexico" had to be produced. On March 21, 1977—two weeks after the court ordered such production for at least the second time—at the direction of Gulf, GAC filed a motion to disqualify the Bigbee firm. The issue was submitted to the trial court on affidavits and depositions.[140] The court denied the motion without making specific findings. The trial court refused to certify the issue for an interlocutory appeal. GAC thereafter sought unsuccessfully to have the denial of its motion of disqualification reviewed by this Court, either as an appeal from a final judgment under the collateral order doctrine of *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949), (No. 11469, June 29, 1977), or as a petition for an extraordinary writ. (No. 11484, July 1, 1977.) GAC renewed the motion in November 1977, which the court again denied.

In 1961, the Bigbee firm began to represent United in connection with its uranium activities in New Mexico. It has continuously represented United since that time. In 1971, Gulf hired the Bigbee firm to represent it on legal matters relating to Gulf's uranium operations in New Mexico, particularly the large reserves at Mt. Taylor it was then in the process of acquiring. The Bigbee

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[140] At a hearing in May 1977, GAC informed the court that there was no need for an evidentiary hearing because "there is no genuine issue [as] to any material fact." On appeal, GAC has reversed itself, and argues that there are disputed facts as to some issues, and that an evidentiary hearing was required. In light of its representation to the trial court, and the approach we take to this issue, it is unnecessary for us to decide this question.

firm had continued to represent Gulf until November 1976, ten months after the complaint in this case was filed. The principal services performed by the Bigbee firm for Gulf during this period were perfecting and protecting Gulf's title to mining rights—including maintenance of possessory rights, application for mineral patents, defense of mining claims, and representation in quiet title suits—and representing Gulf before the New Mexico State Legislature on a variety of issues.

GAC contends that because Gulf's uranium production activities in New Mexico became an issue in this case, there is a substantial relationship between the Bigbee firm's past representation of Gulf and its present representation of United in this case, and a concomitant danger that confidential information given to the Bigbee firm in its prior representation might be used against Gulf's interests in the present action. United argues that there was no substantial relationship between its representation of Gulf and United; that Gulf consented to any conflicting representation; and that by delaying raising the disqualification issue, Gulf and GAC were estopped from asserting it.

We believe that the substantial relationship test is the proper standard by which motions to disqualify counsel are to be judged under Canon 4 of the Code of Professional Responsibility, which provides that a lawyer must preserve the confidences and secrets of a client. Simply stated, the substantial relationship standard requires disqualification "where an attorney represents a party in a manner in which the adverse party is that attorney's former client, and the subject matter of the two representations are 'substantially related.'" *Westinghouse Elec. Corp.* v. *Gulf Oil Corp.*, 588 F.2d 221, 223 (7th Cir. 1978), *rev'g Westinghouse Elec. Corp.* v. *Rio Algom, Ltd.*, 448 F.Supp. 1284, 1310-12 (N.D. Ill. 1978). In the *Westinghouse* decision, the Seventh Circuit Court

of Appeals found that the substantial relationship test had been satisfied, and reversed the district court's denial of Gulf's motion to disqualify the Bigbee firm from representing United in the *Westinghouse* uranium litigation. We think that the approach taken by the Seventh Circuit was the proper one. Because the facts and law are fully set forth in its decision, we will not further elaborate on the substantial relationship question.

The substantial relationship standard does not, however, entirely dispose of the question of the propriety of the Bigbee firm's professional conduct in this affair. From the filing of the predecessor to this case on August 8, 1975, to the present time, United has alleged that GAC and Gulf have committed various tortious acts in New Mexico and have violated the New Mexico Antitrust Act. United, represented at all times by the Bigbee firm, has repeatedly asserted that by its action in acquiring, and allegedly delaying production from, its Mt. Taylor reserves, Gulf has committed antitrust violations. For the Bigbee firm to be making these accusations on behalf of United, at the same time that it was continuing to represent Gulf with respect to these very reserves, raises a second ethical question of serious dimensions. The propriety of an attorney making such allegations against a *current*, rather than a former client,

> must be measured not so much against the similarities in litigation, as against the duty of undivided loyalty which an attorney owes to each of his clients.
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> . . . .
>
> Under the Code, the lawyer who would sue his own client, asserting in justification the lack of "substantial relationship" between the litigation and the work he has undertaken to perform for that client, is leaning on a slender reed indeed.[141]

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[141] Although the Bigbee firm had ended its representation of Gulf by the time the motion to disqualify was filed, we think that

Cinema 5, Ltd. v. *Cinerama, Inc.*, 528 F.2d 1384, 1386 (2nd Cir. 1976). *See* Canon 5-105 of the Code of Professional Responsibility;[142] *State* v. *Aguilar*, 87 N.M. 503, 504, 536 P.2d 263, 264 (Ct. App. 1975; *Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, 567 F.2d 225, 232-35 (2nd Cir. 1977).

United argues that "the Bigbee firm's conduct in this litigation was in accord with both the letter and spirit of the highest ethical standards of the bar." We do not agree. However, "a violation of professional ethics does not . . . automatically result in disqualification of counsel."[143] "[E]thical problems cannot be resolved in a vacuum."[144] In disqualification cases, judges cannot "ex-

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this principle is nonetheless applicable here, where the contemporaneous representation of United and Gulf continued for ten months after the filing of this lawsuit.

[142] Canon 5-105 reads in pertinent part:

> (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under Rule 5-105(C).
>
> (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under Rule 5-105(C).
>
> (C) In the situations covered by Rule 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

[143] *W.T. Grant Co.* v. *Haines*, 531 F.2d 671, 677 (2nd Cir. 1976) (citation omitted).

[144] *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562, 565 (2nd Cir. 1973). *See also Silver Chrysler Plymouth, Inc.* v. *Chrysler Mot. Corp.*, 518 F.2d 751, 753 (2nd Cir. 1975).

clude from their minds realities of which fair decision would call for judicial notice." [145] Because a disqualification motion is of an equitable nature,[146] it is appropriate to consider the prior conduct and statements of the movant and its attorneys on the question of the movant's good faith and credibility in connection with the motion to disqualify.[147]

A motion to disqualify opposing counsel should be filed at the onset of the litigation,[148] or "with promptness and reasonable diligence once the facts" upon which the motion is based have become known.[149] A failure to act promptly may warrant denial of the motion.[150]

GAC's delay in raising the disqualification issue—considered in the context of United's allegations against it and GAC's conduct throughout the proceedings in the

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[145] *Silver Chrysler, supra,* 518 F.2d at 753. *See also City of Cleveland* v. *Cleveland Elec. Illuminating,* 440 F.Supp. 193, 197 (N.D. Ohio 1976), *aff'd,* 573 F.2d 1310 (6th Cir. 1977).

[146] *Milone* v. *English,* 113 U.S. App. D.C. 207, 306 F.2d 814, 818 (D.C. Cir. 1962); *Marco* v. *Dulles,* 169 F.Supp. 622, 632 (S.D. N.Y. 1959), *appeal dismissed,* 268 F.2d 192 (2nd Cir. 1959).

[147] *Fleischer* v. *A.A.P., Inc.,* 163 F.Supp. 548, 559 (S.D. N.Y. 1958), *appeal dismissed sub nom., Fleischer* v. *Phillips,* 264 F.2d 515 (2nd Cir. 1959), *cert. denied,* 359 U.S. 1002 (1959). *See also Marco* v. *Dulles, supra,* 169 F.Supp. at 632.

[148] *International Brotherhood of Teamsters, Etc.* v. *Hoffa,* 242 F.Supp. 246, 257 (D.D.C. 1965).

[149] *Milone* v. *English, supra,* 306 F.2d at 818. *See also Marco* v. *Dulles, supra,* 169 F.Supp. at 632.

[150] *Redd* v. *Shell Oil Company,* 518 F.2d 311, 315 (10th Cir. 1975); *Milone* v. *English, supra,* 306 F.2d at 818; *City of Cleveland* v. *Cleveland Elec. Illuminating, supra,* 440 F.Supp. at 203-05; *Marco* v. *Dulles, supra,* 169 F.Supp. at 632. *But see Emle Industries, Inc.* v. *Patentex, Inc., supra,* 478 F.2d at 574; *W.E. Bassett Company* v. *H.C. Cook Company,* 201 F.Supp. 821, 825 (D. Conn. 1961), *aff'd per curiam,* 302 F.2d 268 (2nd Cir. 1962).

trial court—casts serious doubt on the good faith with which it was made. GAC's motion to disqualify the Bigbee firm was filed after twenty months of litigation with United. During this period very extensive pretrial proceedings were conducted in the trial court, and GAC had sought appellate review of several of its decisions both in this Court and the United States Supreme Court. *E.g. General Atomic Co.* v. *Felter, supra*, 90 N.M. 120, 560 P.2d 541, *rev'd, General Atomic Co.* v. *Felter, supra*, 434 U.S. 12, and *United Nuclear Corp.* v. *General Atomic Co., supra*, 90 N.M. 97, 560 P.2d 161. At no time during any of these proceedings was the disqualification issue raised.

GAC finally moved to disqualify the Bigbee firm only after two actions it had filed against United in federal court had been dismissed (*see* n. 84, *supra*); after the trial court in this case had found GAC's answers to the First Set of Interrogatories to be deficient; after United had twice moved for a default judgment for GAC's discovery failures; after the trial court had twice warned that sanctions would be imposed for further failures; after the court had held on at least five separate occasions in as many months that the partners were subject to discovery; after this Court had upheld the trial court's personal jurisdiction over GAC; and after United had raised Gulf's participation in the international uranium cartel as an issue. In this context, GAC's disqualification motion would seem to have been motivated more by "a desire to fragmatize the [opposition] than by any sensitivity to the ethical considerations involved." *Aetna Cas. & Sur. Co.* v. *United States*, 570 F.2d 1197, 1201, n. 7 (4th Cir. 1978), *cert. denied*, 439 U.S. 821 (1978).[161] The delay in raising

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[161] Numerous other courts have recognized that motions to disqualify opposing counsel "have become common tools of the litigation process," *International Electronics Corp.* v. *Flanzer*, 527 F.2d 1288, 1289 (2nd Cir. 1975), which are often used "for purely

the issue could hardly be ascribed to a lack of understanding. GAC and its constituent partners have been represented in this case by large and experienced law firms from throughout the country.[152]

GAC seeks to excuse its delay in raising the disqualification issue by asserting that the legal basis for the Bigbee firm's conflict did not become clear until the court had held that Gulf and Scallop were subject to its discovery orders. Under the terms of United's original discovery requests of December 1975, to which GAC made no objection, the partners were required to provide discovery. Contrary to GAC's representation, it was not in January 1977, but in November 1976, when the court first held that the partners were subject to its discovery orders. GAC waited almost four months after the November order before moving to disqualify the Bigbee firm.

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strategic purposes." *Woods* v. *Covington Cty. Bank*, 537 F.2d 804, 813 (5th Cir. 1976) (footnote omitted). *See also Allegaert* v. *Perot*, 565 F.2d 246, 251 (2nd Cir. 1977); *Redd* v. *Shell Oil Company, supra*, 518 F.2d at 315; *Pennwalt Corp.* v. *Plough, Inc.*, 85 F.R.D. 264, 274 (D. Del. 1980). Comment, "The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts," 45 U. Chi. L. Rev. 450 (1978).

[152] That GAC's and Gulf's inaction was not the result of any innocent misunderstanding is evidenced by the notes of the litigation strategy meeting held shortly after this case was filed. Those notes, to which we have previously referred (*see* n. 32 and 81, *supra*), reflect that GAC and Gulf attorneys rejected a move to disqualify the Bigbee firm. Those notes, taken by an associate general counsel of Gulf, contain these remarks: "Move to disqualify Bigbee from UNC [United]? . . . *Don't* if case gets before Judge Bratton." (Emphasis in original.) Within a week of this meeting, GAC and Gulf filed a declaratory judgment and an interpleader action against United in federal court. *See* n. 84, *supra*. Both cases were assigned to Judge Bratton. In neither case was a disqualification motion filed. Judge Bratton dismissed both actions.

GAC further seeks to excuse its delay by asserting that Gulf's Mt. Taylor uranium operations did not become an issue until early 1977. This excuse is also without merit. The complaint in this case alleged that GAC and Gulf had violated the antitrust laws of New Mexico by restricting trade in, and attempting to monopolize, the uranium market.[153] In light of the fact that the Mt. Taylor reserves are the most significant of Gulf's proven domestic uranium reserves and are the largest single body of uranium ore in the United States, it is clear that these reserves were pertinent to these antitrust allegations.[154]

In pleadings filed over one year before the motion to disqualify the Bigbee firm was filed, United charged that Gulf's "huge uranium reserves . . . in New Mexico . . . are part and parcel of the antitrust violations with which General Atomic is charged." United's counsel also alleged that GAC was "trying with this partner Gulf to monopolize uranium in New Mexico." He said: "That is what this suit is all about." United's reply to GAC's counter-

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[153] In March 1977, GAC's counsel made it clear that GAC recognized that Gulf's activities were at issue. Referring not to anything that had transpired in early 1977, but to "[t]he fact that the first 53 paragraphs [of the complaint] relate to Gulf's misconduct," he told the trial court that "Gulf is the main focal point of the action." He went on to say:

> [N]early all of the misconduct alleged in the complaint was alleged misconduct on the part of Gulf before GAC was even formed. It is not a question of Gulf doing things on behalf of the partnership. What they are being charged primarily with are things that happened before the partnership was even in existence.

[154] It is hard to believe that GAC did not recognize that the Mt. Taylor reserves were an issue in this case until late February 1977 when this Court had done so in October 1976. *United Nuclear Corp.* v. *General Atomic Co.*, *supra*, 90 N.M. at 101, 560 P.2d at 165.

claim, filed in June 1976, directly tied its antitrust allegations to Gulf's Mt. Taylor reserves.

In the *Westinghouse* litigation there was no evidence that Gulf belatedly raised the issue of the disqualification of the Bigbee firm. Furthermore, in that case there was a continuing possibility of the misuse of confidential information against Gulf by the Bigbee firm.[155] In the present case there is no such prospect. GAC nevertheless contends that the judgment entered against it for *its* discovery failures must be reversed—including all discovery orders entered after the disqualification motion was filed—"in order to uphold standards of ethics" for the bar. To accept GAC's position would permit a party to virtually ignore its obligation to follow the rules of discovery and the specific orders of the court, and then entirely escape liability for such misconduct by belatedly asserting a motion to disqualify opposing counsel. In such circumstances, we decline to reverse a judgment that is not tainted by the Bigbee firm's conflict and is otherwise supported by the record. *See W.T. Grant Co.* v. *Haines*, *supra*, 531 F.2d at 677.

V.

DISQUALIFICATION OF THE TRIAL JUDGE

GAC also contends that the sanctions order and default judgment must be reversed because the trial judge refused to disqualify himself. This contention is without merit. GAC has failed to demonstrate either a personal bias or prejudice on the part of Judge Felter toward any

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[155] In *Westinghouse*, the Court of Appeals held that there had been no legally effective consent by Gulf to the Bigbee firm's representation of United in that litigation because "a client's consent will not justify the use of confidential information against the client." 588 F.2d at 228.

party or a reasonable basis for questioning his impartiality.

Two weeks after the complaint in this case was filed, GAC moved under Section 38-3-9, N.M.S.A. 1978, to disqualify Judge Campos, who was originally assigned to hear it. Judge Felter was then assigned to the case. Almost two years later, on November 9, 1977, GAC moved for the first time to disqualify Judge Felter, alleging that by language he used in two discovery orders entered in October 1977, and in in-court remarks he made on November 8, 1977, the judge had demonstrated "a bias, prejudice and 'interest'" against it. The motion was denied on the same day. GAC on two occasions renewed this motion, which the judge again denied. The motions were filed pursuant to Article VI, § 18 of the New Mexico Constitution, Canon 3(C)(1) of the New Mexico Code of Judicial Conduct, and the due process clauses of the United States and New Mexico Constitutions, U.S. Const., Amend. XIV, § 1 and N.M. Const., Art. II, § 18.[156]

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[156] Section 38-3-9, N.M.S.A. 1978, provides that a judge may be disqualified by a party who files an affidavit alleging a "belief" that the judge cannot preside impartially. Under this section a judge is automatically disqualified upon the filing of such an affidavit. *Norton* v. *Reese*, 76 N.M. 602, 604, 417 P.2d 205, 207 (1966); *Rivera* v. *Hutchings*, 59 N.M. 337, 341, 284 P.2d 222, 225 (1955). Thus, mere suspicion of bias or prejudice is a sufficient basis for the exercise of the statutory right of disqualification. *State* v. *Scarborough*, 75 N.M. 702, 713, 410 P.2d 732, 740 (1966) (Noble and Compton, JJ., dissenting). However, only one judge may be disqualified under that section, *Gray* v. *Sanchez*, 86 N.M. 146, 148, 520 P.2d 1091, 1093 (1974); *Beall* v. *Reidy*, 80 N.M. 444, 447, 457 P.2d 376, 379 (1969), and a party must file the disqualification affidavit within the statutory time limitations set forth in Section 38-3-10, N.M.S.A. 1978, which are strictly construed. *Gerety* v. *Demers*, 92 N.M. 396, 401, 589 P.2d 180, 185 (1978).

Because Judge Campos had already been disqualified, and because the motion to disqualify Judge Felter was not filed within the time limitations of Section 38-3-10, GAC had no *statutory*

GAC's charge of bias and prejudice is based on the following allegations:

(1) The "vituperative tone" of several of the judge's orders and statements, especially in the sanctions order and default judgment, manifested a personal hostility towards GAC.

(2) The judge's actions during the trial were one-sided in favor of United, as evidenced by his interruption and termination of GAC's cross-examination of United's witnesses, his curtailment of GAC's right to impeach those witnesses, and his questioning of witnesses.

(3) Various orders and rulings on questions of evidence, procedure and discovery were favorable to United, prejudicial to GAC, and explainable only as expressions of hostility to GAC.

(4) In his conduct of pre-trial discovery and in his entry of sanctions, the judge acted with unrea-

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right to disqualify Judge Felter. However, the right of disqualification provided by Section 38-3-9 is not the exclusive method of disqualification. *See State* v. *Scarborough, supra*, 75 N.M. at 709, 410 P.2d at 736-37. *But see Doe* v. *State*, 91 N.M. 51, 52, 570 P.2d 589, 590 (1977). The guarantee of a fair and impartial tribunal, embodied in Article VI, § 18 and Canon 3(C)(1), and assured by the concept of due process, cannot be rendered meaningless by the limitations found in Sections 38-3-9 and 38-3-10. However, though mere suspicion is a sufficient basis for disqualification under Section 38-3-9, the other methods require more, as we explain in this section of the opinion. Although not strictly limited by the time limitations of Section 38-3-10, a disqualification motion based on one of the non-statutory grounds must nevertheless be filed within a reasonable time after the party becomes aware of the grounds for it. *Cf. In Re International Business Machines Corp.*, 618 F.2d 923, 932 (2nd Cir. 1980) (construing similar federal provisions). Because we find there was no basis to disqualify Judge Felter, we do not consider the question of the timeliness of GAC's motion.

> sonable haste and without exercising independent judgment, thereby prejudicing GAC and favoring United.

In this section of the opinion we are not concerned with whether the various rulings GAC complains of were legally correct, but rather, with whether those rulings are sufficient to establish that Judge Felter had a personal bias and prejudice against GAC.

Article VI, § 18 of the New Mexico Constitution provides: "No justice, judge or magistrate of any court shall, except by consent of all parties, sit in any cause . . . in which he has an interest." In *State* v. *Scarborough, supra*, 75 N.M. at 705, 410 P.2d at 734, we said that an "interest" necessary to disqualify a judge under this constitutional provision may be an actual bias or prejudice. However, we agree with the construction given to the term "bias or prejudice" by the United States Supreme Court in *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966), where, in construing a federal judicial disqualification statute, 28 U.S.C. § 144, the Court held:

> The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. (Citation omitted.)

See also In Re International Business Machines Corp., 618 F.2d 923, 927-28 (2nd Cir. 1980); *United States* v. *Haldeman*, 181 U.S. App. 254, 559 F.2d 31, 132. (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977); *United States* v. *Conforte*, 457 F.Supp. 641, 657 (D. Nev. 1978); *Lazofsky* v. *Sommerset Bus Co., Inc.*, 389 F.Supp. 1041, 1043 (E.D. N.Y. 1975). Stated another way, the bias must be personal, and not judicial. *In Re International Business Machines Corp., supra*, 618 F.2d at 929.

GAC's original motion to disqualify Judge Felter was filed one day after he had accused GAC of "cover-ups" and "stonewalling information" in connection with an effort by Gulf to quash a subpoena issued for S. A. Zagnoli, the executive vice-president of Gulf Minerals in Denver.[167]

Although these remarks were the immediate precipitating event for the disqualification effort and the principal example of the judge's alleged bias and prejudice up to that time, GAC also cited the court's discovery order of October 11, 1977, wherein the court found that GAC had not answered United's Second Set of Interrogatories in good faith, and an order of the court on October 27, 1977, denying GAC's motion for a continuance of the trial setting, wherein the court stated that adequate time had been given for trial preparation "by the exercise of reasonable diligence and good faith."

GAC has yet to show any extrajudicial conduct or incident which demonstrates any bias or prejudice on the

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[167] GAC had listed Zagnoli, who had represented Gulf at several cartel-related meetings, as a possible GAC witness at trial. United sought to have him appear to identify documents produced from Gulf files by GAC. The court granted the motion to quash, but stated:

> I will not completely buy this nonparty corporate stonewall proposition. The separate corporate identities and the rules relating to partnerships and so forth are not calculated to foment and bring about cover-ups and stonewalling information, and I am not going to permit them to be used that way.
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> . . . [I]t seems to me that General Atomic easily could have voluntarily brought about the appearance of Mr. Zagnoli here without any harm to themselves. . . . But instead, it seems they desire to hide behind procedural and other rules in order to play a game of hide-and-go-seek with this Court, and I am getting sick of it . . . .
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> I don't think that you are acting in good faith at all in this regard. I think you are trying to suppress information that could be brought to light and aid this Court. . . .

part of Judge Felter.[158] Because GAC can establish no extrajudicial source for Judge Felter's alleged bias, it is forced to rely exclusively on his in-court comments and rulings. But as we have said, these afford no basis for disqualification.[159] The reasons for the extrajudicial

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[158] GAC does suggest that certain newspaper articles which discussed the favorable impact on the State of a judgment for United "could have had a serious prejudicial effect on the court," and amounted to "public pressure exerted through partisan appeals in the media." This is the very type of "indirect, remote, speculative, theoretical or possible interest" which we have previously said is not sufficient to warrant disqualification under Article VI, § 18. *State* v. *Scarborough, supra*, 75 N.M. at 705, 410 P.2d at 734. The articles were clearly not "partisan appeals." GAC has not shown that Judge Felter ever read those articles. Furthermore, many of the rulings that GAC relies on to support its claim of bias were made before the articles were published. It is difficult to believe that two innocuous newspaper articles had within two weeks of their publication transformed a judge, who GAC had said in May 1977 "has certainly furnished us complete due process all along," into what it now describes as a "patently hostile" jurist, harboring "personal grudges" and incapable of "calm impartial consideration."

[159] We do not mean to suggest that a judge's in-court conduct can never be relevent to show a *personal* bias or prejudice against a party which has an extrajudicial source. *See In Re International Business Machines Corp., supra*, 618 F.2d at 928, n. 6. The critical distinction between an impermissible personal, extrajudicial bias, and in-court opinions was explained in *United States* v. *Conforte, supra*, 457 F.Supp. at 658, n. 12:

> The purpose of the extra-judicial source requirement concerns the origin of the judge's bias rather than the place of its expression. Certainly, judicial rulings or comments on the evidence made during the course of a proceeding do not fall within the rule. However, if a judge's statements or conduct during a trial refer to or reflect bias or prejudice which arose outside of his judicial duties, then the extra-judicial source rule is satisfied and recusal may be required.

The practical meaning of this distinction is perhaps best exemplified by comparing the statements and rulings which allegedly showed Judge Felter's bias with the in-court statements of the trial

source rule were recently set forth by the Second Circuit Court of Appeals in *In Re International Business Machines Corp., supra,* which involved a similar factual situation.

In the first place,

> [a] trial judge must be free to make rulings on the merits without the apprehension that if he makes a disproportionate number in favor of one litigant, he may have created the impression of bias. Judicial independence cannot be subservient to a statistical study of the calls he has made during the contest.

618 F.2d at 929.

Second, a judge is not merely "a passive observer." *Id.* at 930.

> He must . . . shrewdly observe the stratagems of the opposing lawyers, perceive their efforts to sway him by appeals to his predilections. He must cannily penetrate through the surface of their remarks to their real purposes and motives. He has an official obligation to become prejudiced in that sense. Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions.

Id., quoting from *In Re J. P. Linahan,* 138 F.2d 650, 654 (2nd Cir. 1943) (footnotes omitted).

Criticism by the court of a party or its counsel is inevitable if the court's discovery orders are to be enforced in the face of a party's intransigence. Indeed, the ultimate discovery sanctions imposed here require

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judge who was disqualified in *United States* v. *Hatahley,* 257 F.2d 920, 925-26 (10th Cir. 1958), *cert. denied,* 358 U.S. 899 (1958).

a finding of bad faith or willfulness. *See* Section III, *supra*. Since the principal evidence of the judge's alleged bias is the language he used to describe what he found to be GAC's bad faith in discovery, it would seem that if GAC's argument were accepted, only a biased judge could ever make the requisite finding of bad faith necessary to support the sanctions authorized by Rule 37(b)(2)(iii).[160] If this were true, such sanctions could never be imposed.[161]

Rulings adverse to a party do not necessarily evince a personal bias or prejudice on the part of the judge against it, even if the rulings are later found to have been legally incorrect. In *International Business Ma-*

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[160] GAC also argues that the fact that the recitals containing this language were adopted almost verbatim from the proposed findings of United demonstrates the judge's bias against it and in favor of United. Although, as we have noted, this practice is not to be commended, it does not necessarily demonstrate that the judge acted in such a judicially irresponsible way as to require his disqualification. *See Ramey Const. Co., Inc.* v. *Apache Tribe, Etc., supra*, 616 F.2d at 468-69.

[161] Not only is Judge Felter's description of GAC's conduct supported by the record, but also, it was similar to language other courts have used to describe bad faith discovery efforts. *See e.g., Fox* v. *Studebaker-Worthington, Inc.*, 516 F.2d 989, 991 (8th Cir. 1975) ("shocking abuse," "flagrant violations of the rules of discovery"); *Conrad Music* v. *Modern Distributors, Inc.*, 433 F.Supp. 269, 270 (C.D. Cal. 1977) ("utter disdain," "gross indifference," "deliberate callousness"); *Technograph Printed Cir.* v. *Packard Bell Electronics Corp.*, 290 F.Supp. 308, 320 (C.D. Cal. 1968) ("wilful, intentional, and conscious flouting and disobedience," "callous, cynical disdain"); *Life Music, Inc.* v. *Broadcast Music, Inc., supra*, 41 F.R.D. at 28 (S.D. N.Y. 1966) ("deliberate flouting of this court's order," "willful, intentional, and in bad faith," "contumacious conduct calculated and designed to frustrate the orders of this court," "reprehensible and irresponsible in the extreme").

chines, IBM contended, as GAC does here, that various erroneous rulings of the trial judge demonstrated that he was personally biased or prejudiced against it. The Second Circuit rejected this notion, stating that it

> would necessarily require this court to examine each and every ruling to determine whether it was, initially, legally valid. If we determine that some adverse rulings were correctly made, obviously they could not be tainted by bias. Even if they were deemed to be incorrect, it of course does not follow that they were motivated by personal bias. We would next have to ask whether the error could be attributed to the judge's misunderstanding of the facts or the law. The exercise would require this court to become intimately familiar with a 90,000 page trial transcript and to examine thousands of underlying documents and exhibits.

Id. at 930. The court concluded that it would be meaningless for it to determine the propriety of each contested ruling because it would be impossible to "divine its motivation." *Id.* at 933. In such circumstances, "the attribution of extrajudicial bias would require extrasensory perception." *Id.* at 934.

Another reason for the rule that judicial disqualification may not be based on in-court rulings is that "such rulings are reviewable otherwise." *Ex Parte Am. Steel Barrel Co.*, 230 U.S. 35, 44 (1913). *See In Re International Business Machines Corp.*, *supra*, 618 F.2d at 929. This is particularly true here, where the propriety of the court's discovery orders and sanctions—which were the principal bases for the motions to disqualify Judge Felter—have been subject to full appellate review in this Court. *See* Sections II and III, *supra*.

GAC's contention that, independently of Article VI, § 18 of the New Mexico Constitution, Judge Felter's dis-

qualification was required by Canon 3(C)(1) of the New Mexico Code of Judicial Conduct is also without merit. That Canon provides: "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned. . . ." This provision sets up an objective standard geared to the appearance of justice, and thus expands the instances in which a judge should disqualify himself beyond those set out in Article VI, § 18. However, we adopt the construction given to an identical provision in 28 U.S.C. § 455(a) (1976), to the effect that there must be "a reasonable factual basis for doubting the judge's impartiality." Report of the Judiciary Committee of the United States House of Representatives (1974 U.S. Code Cong. & Ad. News 6351, 6355).

> [I]n assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a *reasonable* basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not to have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.

S. Rep. No. 93-419, 93d Cong., 1st Sess. 5 (1973); H. Rep. No. 93-1453, 93d Cong., 2d Sess. 5 (1974).[162]

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[162] It is important to note that GAC moved to disqualify Judge Felter only after he had warned time and time again that he would impose sanctions for failure by either party to comply with the court's discovery orders; after he found in October 1977 that GAC had not previously acted in good faith in discovery; and

For the very same reasons that courts have refused to permit a judge's in-court rulings to form the basis for his disqualification for actual bias or prejudice, Canon 3(C)(1) and identical language in its federal counterpart have been repeatedly construed to require extrajudicial bias. *In Re International Business Machines Corp., supra,* 618 F.2d at 929; *United States* v. *Haldeman, supra,* 559 F.2d at 132-33, n. 297.[163] In *Lazofsky* v. *Sommerset Bus Co., Inc., supra,* 389 F.Supp. at 1044, the court said:

> If the words "impartiality might reasonably be questioned" and "avoid impropriety and the appearance of impropriety" were to be interpreted to encompass judicial rulings in the course of a trial or other proceeding, . . . then there would be almost no limit to disqualification motions and the way would be opened to a return to "judge shopping", a practice which has been for the most part universally condemned. Certainly every ruling on an arguable point during a proceeding may give "the appearance of" partiality, in the broadest sense of those terms, to one party or the other.

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after United had filed its fourth motion for sanctions. This is not the first case in which a party faced with the imposition of sanctions for its discovery failures has sought to question the judge's integrity and impartiality. *State of Ohio* v. *Arthur Andersen & Co., supra,* 570 F.2d at 1372; *Henry* v. *Sneiders,* 490 F.2d 315, 317-18 (9th Cir. 1974), *cert. denied,* 419 U.S. 832 (1974); *Pioche Mines Consolidated, Inc.* v. *Dolman, supra,* 333 F.2d at 259.

[163] Canon 3(C)(1)(a) states that one instance in which a judge's impartiality "might reasonably be questioned" is where "he has a *personal* bias or prejudice concerning a party." (Emphasis added.) Because subsection (a) is not the only such instance, disqualification under Canon 3(C)(1) could also be required where the judge did not in fact have such a personal bias, but where there was nonetheless "a reasonable factual basis" for believing that he did. However, for the reasons stated in the text, even in that instance the extrajudicial source requirement must be satisfied.

Therefore, we conclude that GAC's disqualification argument under Canon 3(C)(1) is deficient for the same reasons it is under Article VI, § 18 of the New Mexico Constitution.[164]

Because GAC failed to meet its burden of establishing that Judge Felter had a personal or extrajudicial bias or prejudice against it, the judge properly refused to disqualify himself. *See Gerety* v. *Demers, supra*, 92 N.M. at 400, 589 P.2d at 184; *In Re International Business Machines Corp., supra*, 618 F.2d at 934.

VI.

APPROPRIATENESS OF THE REMEDIES GRANTED APPELLEES

In this final section of the opinion we examine GAC's contentions concerning the propriety of the remedies awarded United and I&M by the trial court.

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[164] Our determination that Judge Felter's disqualification was not mandated by Article VI, § 18 of the New Mexico Constitution or Canon 3(C)(1) of the Code of Judicial Conduct disposes of GAC's claim that its due process right to a fair trial was violated by Judge Felter's alleged bias against it. Clearly, the right to "[a] fair trial in a fair tribunal is a basic requirement of due process." *In Re Murchison*, 349 U.S. 133, 136 (1955). *See also Beall* v. *Reidy, supra*, 80 N.M. at 446, 457 P.2d at 378. Although we cannot say that a judge's disqualification may never be required by the due process clauses of the United States and New Mexico Constitutions even though it is not also mandated by Article VI, § 18 of the State Constitution or Canon 3(C)(1), it is difficult to conceive of circumstances in which a claim sufficient under the latter two standards would not also satisfy the due process test. *See In Re International Business Machines Corp., supra*, 618 F.2d at 932, n. 11; *United States* v. *Haldeman, supra*, 559 F.2d at 130, n. 276; *United States* v. *Conforte, supra*, 457 F.Supp. at 659, n. 13 (D. Nev. 1978).

After entry of the sanctions order and default judgment, the court conducted a trial on damages.[165] The court invalidated the 1973 and 1974 Supply Agreements, and held that United had no obligation to supply any uranium to GAC or its predecessors. The court also found that GAC was obligated to indemnify United for any liabilities connected to United's failure to deliver uranium covered by the 1973 Agreement or any of the utility contracts. The court awarded I&M $15,950,752 in damages, and decreed specific performance of GAC's obligation to supply uranium to I&M. GAC contends that these remedies were improper.

GAC argues that the invalidation of a contract which displaced a prior, valid contract reinstates the prior contract. GAC also argues that rescission of a contract requires restoration of the status quo ante. *Prudential Insurance Company of America* v. *Anaya*, 78 N.M. 101, 106, 428 P.2d 640, 645 (1967). Because the 1973 Supply Agreement replaced the 1971 Agreement and continued United's obligation to supply uranium to Gulf-United, GAC contends that if the 1973 Agreement was correctly invalidated, the 1971 Agreement remains in force. Therefore, it concludes that the trial court erred in holding that United had no further obligations to supply uranium to GAC. Alternatively, GAC argues that if the 1971 Agreement is also invalidated, United remains obligated to supply uranium to the utilities by virtue of the utility contracts it entered into prior to the execution of the 1971 Agreement.

The principles GAC relies on do not apply here. Entry of the default had the effect of establishing as true the allegations of the complaint (*Gallegos* v. *Franklin*, *supra*,

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[165] Upon the default, GAC is deemed to have admitted the allegations of the complaint, but the prevailing parties must prove the damages to which they are entitled. *Gallegos* v. *Franklin*, *supra*, 89 N.M. at 123, 547 P.2d at 1165.

89 N.M. at 123, 547 P.2d at 1165)—namely that the 1973 Supply Agreement were unenforceable due to antitrust violations, fraud, breach of fiduciary duty, economic coercion and commercial impracticability. Among the averments established by the default was that the purpose or effect of the 1973 Agreement was to restrain trade in and further the monopolization of the uranium market in New Mexico. Acceptance of GAC's contract revival argument would merely substitute one invalid contract with another which would have the same illegal effect. *See Evans* v. *Ideal Brick and Brikcrete Mfg. Co.*, 287 P.2d 454, 456 (Okla. 1955). The default also established as true the allegation that United's performance of the 1973 Agreement was commercially impracticable. If performance of the 1973 Agreement is commercially impracticable, performance of the 1971 Agreement at the lower prices contained therein would be even more so.

Second, GAC contends that there was no basis for the trial court to hold that GAC was obligated to indemnify United. We disagree. In this instance, the issue of indemnification was a question of liability and not of damages. United pled facts entitling it to indemnification. The default established the truth of those averments. *Gallegos* v. *Franklin, supra.*

Finally, GAC contends that the remedies awarded to I&M were improper because I&M was not entitled to specific performance of its contract, and because the trial court improperly refused to hear evidence on limitation of liability and equitable adjustment clauses in the I&M contract.

GAC argues that specific performance was not a proper remedy because fabricated nuclear fuel is not a unique good. Section 55-2-716, N.M.S.A. 1978, provides that specific performance may be decreed "where the goods are unique or in other proper circumstances." Official Com-

ment 1 to Section 55-2-716 states that the intent of this provision is to liberalize the availability of this remedy. Comment 2 makes it clear that the uniqueness of the goods is not "the sole basis of the remedy." A decree of specific performance is proper where the remedy at law, in this case damages, is inadequate. To be adequate, the remedy at law " 'must be as certain, prompt, complete, and efficient to attain the ends of justice as a decree of specific performance.' " *Laclede Gas Company* v. *Amoco Oil Company*, 522 F.2d 33, 40 (8th Cir. 1975), quoting from *National Marking Mach. Co.* v. *Triumph Mfg. Co.*, 13 F.2d 6, 9 (8th Cir. 1926).

In this case, there is substantial evidence to support the conclusion that damages are an inadequate remedy. The evidence shows that no seller was willing to make a long-term contract with I&M on any basis other than the market price at the time of delivery. Because fixed price contracts for future delivery were unavailable, there was no way to predict the price I&M might have to pay. Thus, specific performance was a proper remedy, even though the goods involved are not "unique" in the traditional sense of that term. Other courts have decreed specific performance in similar circumstances. *Laclede Gas Company* v. *Amoco Oil Company, supra*, 522 F.2d at 40 (supply contract for propane); *Eastern Air Lines, Inc.* v. *Gulf Oil Corp.*, 415 F.Supp. 429, 442-43 (S.D. Fla. 1975) (supply contract for aviation fuel).

The issues concerning the limitation of liability and equitable adjustment clauses are more troubling. The I&M contract contains a clause which limits the seller's liability. Another clause provides for certain adjustments in price for increased costs incurred by the seller as a result of delays caused by the purchaser. The trial court held that by reason of the default, GAC was precluded from offering evidence on either issue. We disagree.

The limitation of liability clause is directly related to the question of damages. A hearing on its applicability was not precluded by the act of default. *See Kohlenberger, Inc.* v. *Tyson's Foods, Inc.*, 256 Ark. 584, 510 S.W.2d 555, 565 (1974). We need not consider I&M's various arguments as to the inapplicability of this clause. The time and place for resolving those issues is at a damages hearing in the trial court.

We also hold that the trial court erred in refusing to hear evidence on the question of the applicability of the equitable adjustment clause of the I&M contract. I&M argues that the default established that "the largest component of GAC's claimed increase in cost" was caused by the activities of the cartel, and that GAC therefore had no equitable claim to compel I&M to bear the consequences of GAC's misdeeds. Although the default established that uranium price increases were due to cartel activities, which is a finding we do not disturb, GAC was nevertheless entitled to show that other costs, such as those for separative work, were due to I&M's delays in constructing one of its nuclear reactors, and that it was therefore entitled to price increases under the equitable adjustment clause of the I&M contract.

The trial court did not make specific findings setting forth any factual or legal basis for precluding evidence with respect to these contractual clauses. A search of the record shows a dearth of argument, briefing, or other means by which we can pin point the reasons for that decision. On the record before us, we cannot determine whether these clauses are applicable, or whether, if applied, they would reduce the amount of damages which were awarded. That award will not be disturbed unless on remand the trial court finds that the limitation of liability or equitable adjustment clauses are applicable and would change the result. We are satisfied that the trial court adequately considered the other damage ques-

tions GAC raises on appeal. However, the case is remanded to the trial court for the limited purpose of a hearing on the applicability of the limitation of liability and equitable adjustment clauses of the I&M contract.

VII.

CONCLUSION

Our exhaustive examination of the record in this extraordinary case convinces us that the trial court properly found that GAC had acted in bad faith throughout the discovery process and that the court did not, in the face of such misconduct, abuse its discretion in entering the sanction of a default judgment.

In discovery, as well as in other aspects of this litigation, GAC's efforts have been marked by an extraordinary lack of diligence that cannot be characterized as accidental, unintentional, or involuntary. In addition to the discovery failures we have extensively outlined, GAC unjustifiably delayed asserting its rights to arbitration, *United Nuclear Corp.* v. *General Atomic Co.*, *supra*, 93 N.M. 105, 597 P.2d 290, and to the disqualification of UNC's counsel. The following language of the court in *Pioche Mines Consolidated, Inc.* v. *Dolman*, *supra*, 333 F.2d at 260, aptly characterizes the situation here:

> Throughout, appellants' position has been that the litigation is totally without merit. One cannot help wondering why, if this is so, appellants did not promptly answer, press for an early trial, and get a judgment to that effect.

The trial court's conclusion that GAC pursued a persistent policy of delay and resistance is supported by the record; indeed, that conclusion is inescapable.

Therefore, the sanctions order and default judgment is affirmed. The amended final judgment is also affirmed,

except to the extent that evidence as to the limitation of liability and equitable adjustment clauses of the I&M contract was excluded. The cause is remanded for the purpose of holding a new hearing on those limited issues.

IT IS SO ORDERED.

/s/ H. Vern Payne
H. VERN PAYNE
Justice

WE CONCUR:

/s/ Dan Sosa, Jr.
DAN SOSA, JR.
Chief Justice

/s/ Mack Easley
MACK EASLEY
Justice

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

No. 11,775

UNITED NUCLEAR CORPORATION,
Plaintiff-Appellee,

vs.

GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,
Defendant-Appellant,

INDIANA AND MICHIGAN ELECTRIC COMPANY,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
EDWIN L. FELTER, District Judge

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OPINION

EASLEY, Justice.

Appellee-plaintiff, United Nuclear Corporation (UNC), filed this declaratory judgment action in the Santa Fe County District Court against appellant-defendant, General Atomic Company (GAC), alleging fraud, unlawful monopolistic practices and violation of the antitrust laws, and seeking cancellation of two uranium supply contracts and damages. GAC denied those allegations, claimed the principal issues are subject to arbitration under the terms of the contract, and counterclaimed against UNC for over one billion dollars in damages.

Indiana and Michigan Electric Company (I & M) and Detroit Edison Company (Detroit), (collectively "the utilities"), were brought into the suit as third-party defendants because they were to be supplied uranium products by GAC from the supplies that UNC had contracted to deliver.

The district court enjoined GAC from proceeding to litigate or arbitrate the same issues in any other jurisdiction. GAC appealed to the U.S. Supreme Court, and that Court reversed.

The trial had been in progress several days when the U.S. Supreme Court mandate came down, but GAC

moved to stay the trial until arbitration of the issues could be accomplished. The trial judge denied the motion on the grounds that GAC had waived its right to arbitration. GAC appeals this partial final judgment. We affirm.

The principal issues are:

(1) Whether the Federal Arbitration Act applies.

(2) Whether the issue of waiver of arbitration is for the court or for the arbitrators.

(3) If the determination is to be made by the court, whether the evidence here supports the trial court's finding of waiver.

(4) Whether under the circumstances GAC was constitutionally entitled to further hearing before the district court on the issue of waiver.

Other claims advanced by GAC are that: (5) the trial court's actions were inconsistent with the decision of the U.S. Supreme Court in this case; (6) the holding that the state's antitrust claims are not arbitrable was in error; (7) the trial court should have stayed or severed the Duke and Commonwealth demands; and, (8) UNC obtained incorrect findings on issues not addressed below.

Factual Background

As we survey the massive accumulation of evidence, which could be measured by the ton, the key inquiry is: What was the intent of GAC? Did it intend to arbitrate, litigate or both? In order to determine this intent, we consider all the material assertions and objective manifestations of GAC, together with all other facts and circumstances. This calls for greater detail in setting forth the facts.

UNC and GAC were parties to two contracts, one dated June 30, 1973 (1973 Supply Agreement) cover-

ing approximately twenty-five million pounds of uranium, and one dated June 28, 1974 covering three million pounds of uranium (1974 Concentrates Agreement), under which UNC was to supply uranium to GAC. The 1973 Supply Agreement contained an arbitration clause calling for arbitration of all disputes under the rules of the American Arbitration Association (AAA). These rules provide a simple method of invoking arbitration. The initiating party makes demand, setting forth the nature of the dispute, the amount involved and the remedy sought. This is served on the other party and filed in any regional office of AAA, accompanied by a proper fee. (When GAC ultimately filed its motion for stay, it consisted of two pages, and the demand for arbitration contained three and one-half pages.)

GAC is a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc. On August 8, 1975 UNC first filed suit in the Santa Fe District Court against GAC as well as the individual partners in GAC, Gulf and Scallop, asking for a declaratory judgment and damages and raising all issues arising under the 1973 Supply Agreement. The cause was removed by the defendants to the U.S. District Court for the District of New Mexico. Gulf and Scallop moved to extend the time to answer the complaint and to object to interrogatories propounded by UNC. As grounds for the motion, movants alleged that more time was necessary to determine whether to seek arbitration.

On October 6, 1975 Gulf filed a motion for additional time, stating that failure to demand arbitration prior to answering the complaint without asserting its right to arbitration might constitute a waiver of Gulf's right to compel arbitration. UNC sought voluntary dismissal of the cause in federal court, *which the defendants opposed*; but, the case was dismissed on December 31, 1975, five months after being filed. Neither GAC, Gulf nor

Scallop had demanded arbitration or requested a stay in the proceedings to arbitrate.

On December 31, 1975, the same day the first suit was dismissed, UNC again filed suit, against GAC only, in the District Court of Santa Fe County alleging virtually identical claims and filing identical interrogatories. GAC then filed an affidavit of disqualification against Judge Santiago Campos.

On January 19, 1976 GAC filed a federal interpleader action in the U.S. District Court for the District of New Mexico against UNC, I & M, and Detroit as well as Duke Power Company and Commonwealth Edison Company. Although stating that it was not waiving its right to arbitration, GAC sought the judicial determination of all the rights and obligations of the parties under the 1973 Supply Agreement and other utility agreements. On March 2, 1976 the case was dismissed for lack of subject matter jurisdiction. GAC appealed the dismissal to the Tenth Circuit where it was affirmed in April of 1977. *General Atomic Co.* v. *Duke Power Co.*, 553 F.2d 53 (10th Cir. 1977).

In February and March 1976 GAC filed motions to dismiss for lack of personal jurisdiction, for additional time to answer interrogatories, and for dismissal due to the failure to join certain parties. All three motions specified that they were made "without waiving its right to demand arbitration."

In a brief in support of its application to dismiss for lack of jurisdiction, filed on March 22, 1976, the following statement was contained: "At the outset, defendant admits to having filed various legal actions in New Mexico because New Mexico provided the only or best forum for the vindication of its rights in various matters."

In March 1976 UNC moved for a default judgment for a willful failure to answer interrogatories, but later withdrew the application "in consideration of the agreement attached hereto." The agreement specified that GAC was to answer "in good faith all interrogatories to defendant presently pending." The parties stipulated to a number of actions to be taken in the discovery process which would not have been available as a matter of right under arbitration, and which ultimately cost the parties millions of dollars. Nothing was mentioned in the stipulation regarding GAC's asserted right to arbitrate.

On March 15, 1976 UNC applied for an injunction to restrain GAC from *filing suit* against UNC in other jurisdictions concerning the same facts and circumstances. No mention was made of arbitration. On that same date a temporary restraining order was issued for a ten-day period prior to the hearing enjoining GAC from filing suits or third-party complaints against UNC in any other jurisdiction. The restraining order placed no restraints on GAC against demanding arbitration and seeking a stay of the court proceedings during this period of time, which was seven months after the first complaint had been filed. Up to that time, GAC had made no demand for arbitration upon which a challenge to the jurisdiction of the court could be predicated. GAC filed a response and memorandum brief in answer to the motion for a preliminary injunction but did not mention the issue of arbitration therein.

The first indication in the record of proceedings that arbitration might be enjoined is a statement by the court at the hearing held on April 2, 1976 on the application for enjoining lawsuits in other forums. The judge referred tc a letter written by him, dated March 29, 1976, three days before the hearing, in which he had outlined the terms of the proposed preliminary injunction. One

of the terms was to restrain GAC from seeking *arbitration* in any other forum, a remedy not even requested by UNC. The letter was received by GAC attorneys on March 30, 1976. No effort was indicated on the part of GAC to preclude a hearing on restraints against arbitration because of lack of proper notice, and no effort to demand arbitration before the hearing. The preliminary injunction followed closely the statement of terms contained in the letter.

As bearing on GAC's avowed allegiance to arbitration of the issues here, there was a significant colloquy among the attorneys and the judge at the hearing on the motion for preliminary injunction held three days after GAC received the judge's letter. The letter and the form of the preliminary injunction were under discussion. GAC made reference to the clause in the contract providing for arbitration and called specific attention to the New Mexico Uniform Arbitration Act, § 44-7-2(D), N.M.S.A. 1978, which reads as follows:

> Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section. . . .

During those proceedings nothing was mentioned by GAC regarding federal arbitration rights.

GAC's attorney stated further: "We want to make sure and we have admitted language to this effect, that we are not foreclosed, because obviously the Plaintiff would not be foreclosed from demanding arbitration *in this action.*" (Emphasis added.) GAC further complained that it was unequal treatment to enjoin GAC from participation in arbitration in other actions and not to restrain UNC from doing so. GAC asked that it not be deprived of the right to demand arbitration and suggested that it would be inappropriate to foreclose such remedy.

UNC stipulated that it should be equally enjoined by the preliminary injunction and the court interlined wording in the order to effect this purpose. The following discussion then took place:

> MR. THOMPSON: . . . [W]e believe that we should not be foreclosed, in spite of what the Plaintiff has stated at this point. I have also raised the question of the *possibility* of the Defendants desiring to exercise their rights to arbitration *in this case*, under Article 17 of the Contract, . . . (Emphasis added.)
>
> THE COURT: Subject to the supervision of this court.
>
> MR. THOMPSON: *That is correct.* We would ask that the Injunction be clear in excluding any prohibition against us demanding arbitration *in this case.* (Emphasis added.)
>
> MR. BIGBEE: It is clear enough anyway, anything they want to file into this action will be subject to your Honor's decision.
>
> THE COURT: Did you, Mr. Bigbee, in your application for a Preliminary Injunction contemplate that the Defendants be enjoined from arbitrating under the Arbitration Clause of the Contract in this forum subject to the jurisdiction of this Court?
>
> MR. BIGBEE: I did not. I understood that it may or may not come up. I have asked repeatedly if they want arbitration, they have never answered me; I think they waived it. That is not the point that I wanted an Injunction on. Anything they want to submit under their responsive pleadings, under the rules, they are entitled to do it.

The court, at another point when the language of the preliminary injunction was being discussed, stated:

THE COURT: I don't think there is anything in the language here that relates to arbitration in this forum pursuant to the arbitration clause contained in the contract. If there is any question about it that can be clarified.

MR. BIGBEE: There is no question, that they have the right to include that, whether it should be granted, or what[,] it is, [sic] under Your Honor's jurisdiction. . . .

The preliminary injunction, as issued, restrained GAC from either arbitrating or litigating the same issues "in any other forum." The dispute was brought to this Court, where the trial court was sustained, and then was taken to the United States Supreme Court, which held that the trial court could not properly restrain GAC from seeking relief in federal courts or by arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 1-14.

GAC filed its answer on May 5, 1976 stating that the answer was "as to all matters in which arbitration is not being sought by defendant and as to all issues which the court may deem unarbitrable." GAC did not raise the issue of arbitration as an affirmative defense, nor did it ask for a stay in the proceedings for the purpose of demanding arbitration or arbitrating the dispute. GAC also counterclaimed, asking the court to enforce the contractual obligations or, in the alternative, for damages in the sum of $1,030,000,000 and costs.

The parties prepared a voluminous pre-trial order which was signed by the court and filed in August 1977 in which there was nothing mentioned at any point about arbitration rights, although GAC prepared its portion of the order. I & M and Detroit were involuntarily joined as defendants at the instance of GAC on some issues different from those asserted against UNC.

The first demand for arbitration came on November 30, 1977 and made its way into the record at page 5455 of the transcript of the record proper at a point where it took over 2,000 additional pages of transcript of proceedings to detail the progress of the suit.

Thereafter, for a total period of over two years, dating from the filing of the first complaint up to the demand for arbitration, the parties were in and out of the district court, the federal courts, and this Court dozens of times on motions and interlocutory appeals. Most of the activity in the district court concerned discovery proceedings for which the parties obviously expended millions of dollars. GAC claimed to have submitted 6,000,000 pages of material for UNC to inspect and claimed that UNC had actually copied approximately 180,000 pages. GAC alleged that producing the documents and answering interrogatories propounded by UNC had involved on its part the efforts of more than 37 lawyers, 19 para-professionals, 80 management personnel and engineers, plus secretarial and clerical personnel. The total hours allegedly consumed by April 19, 1977 was estimated to be 34,700. Over 100 depositions were taken resulting in 16,000 pages of testimony and 2,785 deposition exhibits. GAC contended that the parties had designated approximately 11,000 exhibits. UNC claimed that GAC had copied 500,000 pages of its records.

1. *Applicability of The Federal Arbitration Act*

Although there was considerable controversy at trial over whether the state or federal statutes govern the arbitration rights of the parties, the trial court concluded that it had jurisdiction under the Federal Arbitration Act, 9 U.S.C. §§ 1-14. The parties now agree with this judgment, as do we.

GAC insisted below that the federal act applies while UNC was contending that the New Mexico Uniform Arbitration Act governs. Sections 44-7-1 to 22, N.M.S.A. 1978. The trial court first held with UNC, but in the decision being appealed, concluded that jurisdiction was present under both acts. GAC complains that the record does not show that the court decided the issue based on the federal act, although concluding that it applied. We cannot go behind a valid conclusion to invalidate it by showing that the judge reached it for the wrong reasons. *Tsosie* v. *Foundation Reserve Insurance Company*, 77 N.M.671, 427 P.2d 29 (1967); *Holmes* v. *Faycus*, 85 N.M. 740, 516 P.2d 1123 (Ct.App. 1973).

The federal act provides, in § 3, that when a proceeding is brought in court involving any issue referrable to arbitration, the court "shall on application of one of the parties stay the trial until such arbitration has been had . . . providing the applicant for the stay of the action is not in default in proceeding with such arbitration." The statute does not specifically mandate that a demand for arbitration must be made before application is made to the court for a stay. UNC claims that GAC is in "default" under the terms of this statute and has therefore waived its right to seek arbitration.

2. *Forum for Question of Waiver*

GAC insists that the arbitration board and not the court should decide whether GAC has waived its rights to arbitration. Although GAC relies on authority to the contrary,[1] at least a strong majority of courts take jurisdic-

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[1] *Hanes Corp.* v. *Millard*, 531 F.2d 585 (D.C. Cir. 1976); *World Brilliance Corp.* v. *Bethlehem Steel Co.*, 342 F.2d 362 (2d Cir. 1965); *Lundell* v. *Massey-Ferguson Services N.V.*, 277 F. Supp. 940 (N.D. Iowa 1967); *Auxiliary Power Corporation* v. *Eckhardt & Co.*, 266 F. Supp. 1020 (S.D.N.Y. 1966); *Lowry & Co.* v. *S.S. Le Moyne D'Iberville*, 253 F. Supp. 396 (S.D.N.Y. 1966), *appeal dismissed*, 372 F.2d 123 (2d Cir. 1967).

tion over the issue with many finding that waiver has occurred. *Demsey & Associates* v. *S.S. Sea Star*, 461 F.2d 1009 (2d Cir. 1972); *Burton-Dixie Corp.* v. *Timothy McCarthy Const. Co.*, 436 F.2d 405 (5th Cir. 1971); *Cornell & Company* v. *Barber & Ross Company*, 360 F.2d 512 (D.C. Cir. 1966); *American Locomotive Co.* v. *Gyro Process Co.*, 185 F.2d 316 (6th Cir. 1950).[2]

The Federal Arbitration Act, 9 U.S.C. § 3, clearly mandates that a court in which a case is pending, and a stay is requested for arbitration, has jurisdiction to determine whether the movant is "in default in proceeding with such arbitration." Our case was in this precise posture. We hold that the judge was not in error in assuming jurisdiction to decide the question of waiver.

3. *Question of Waiver*

Although there is disagreement from case to case as to what set of facts will justify a holding that a party has waived his rights to arbitration, the federal courts have developed general principles that are useful in appraising

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[2] Other courts that have decided the issue of waiver and found that rights have been lost are: Circuit Courts: *E. C. Ernst, Inc.* v. *Manhattan Const. Co. of Tex.*, 559 F.2d 268 (5th Cir. 1977; on rehearing); *Gutor International AG* v. *Raymond Packer Co., Inc.*, 493 F.2d 938 (1st Cir. 1974); *E. I. Du Pont De Nemours & Co.* v. *Lyles & Lang Const. Co.*, 219 F.2d 328 (4th Cir. 1955), *cert. denied*, 349 U.S. 956 (1955); *American Locomotive Co.* v. *Chemical Research Corp.*, 171 F.2d 115 (6th Cir. 1948); *cert. denied*, 336 U.S. 909 (1949); *Galion Iron Works & Mfg. Co.* v. *J. D. Adams Mfg. Co.*, 128 F.2d 411 (7th Cir. 1942). District Courts: *Weight Watch. of Quebec Ltd.* v. *Weight W. Int., Inc.*, 398 F. Supp. 1057 (E.D.N.Y. 1975); *Liggett & Myers Incorporated* v. *Bloomfield*, 380 F. Supp. 1044 (S.D.N.Y. 1974); *Sulphur Export Corporation* v. *Caribbean Clipper Lines, Inc.*, 277 F. Supp. 632 (E.D. La. 1968); *United Nations Children's Fund* v. *S/S Nordstern*, 251 F. Supp. 833 (S.D.N.Y. 1966). *See also N&D Fashions, Inc.* v. *DHJ Industries Inc.*, 548 F.2d 722 (8th Cir. 1977); *Gulf Central Pipeline Co.* v. *Motor Vessel Lake Placid*, 315 F. Supp. 974 (E.D. La. 1970).

this issue. It has been held that the Federal Arbitration Act evidences a strong federal policy favoring the enforcement of arbitration agreements. *Hanes, supra; Demsey, supra; Carcich* v. *Rederi A/B Nordie*, 389 F.2d 692 (2d Cir. 1968). The reasons for the encouragement of arbitration are to ease the congestion in the court systems, to speed up the resolution of disputes, and to afford a more economical means of disposing of cases. *Griffin* v. *Semperit of America Inc.*, 414 F. Supp. 1384 (S.D. Tex. 1976). *See also Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974); *Commonwealth Edison Co.* v. *Gulf Oil Corp.*, 541 F.2d 1263 (7th Cir. 1976).

As is true in other types of contracts, a party may waive certain terms, but in arbitration agreements the courts hold that all doubts as to whether there is a waiver must be resolved in favor of arbitration. *Robert Lawrence Company* v. *Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909 (1960), *cert. dismissed per stipulation*, 364 U.S. 801 (1960); *Bigge Crane and Rigging Co.* v. *Docutel Corporation*, 371 F. Supp. 240 (E.D.N.Y. 1973).

The party asserting the default in pursuing arbitration bears a heavy burden of proving waiver. *General Guar. Ins. Co.* v. *New Orleans General Agency, Inc.*, 427 F.2d 924 (5th Cir. 1970); *Hilti, Inc.* v. *Oldach*, 392 F.2d 368 (1st Cir. 1968).

The courts generally hold that dilatory conduct by the party seeking arbitration, unaccompanied by prejudice to the opposing party, does not constitute waiver. *Demsey, supra; Carcich, supra.* Waiver cannot be inferred merely from a party's attempt to meet all issues raised between it and another party. *Germany* v. *River Terminal Railway Company*, 477 F.2d 546 (6th Cir. 1973); *Romnes* v. *Bache & Co., Inc.*, 439 F. Supp. 833 (W.D. Wis. 1977). "'[D]efault under the [Federal Arbitration Act] may

not rest mechanically on some act such as the filing of a complaint or answer but must find a basis in prejudice to the objecting party." *Batson Y. & F. M. GR., Inc.* v. *Saurer-Allma GmbH-Allgauer M.*, 311 F. Supp. 68, 73 (S.C. 1970).

It must appear that the delay in requesting arbitration was an intentional relinquishment of the right to arbitrate. Such intention may be inferred when a party takes action inconsistent with its right to demand arbitration. *Weight Watchers, supra. See Cornell, supra; The Belize*, 25 F. Supp. 663 (S.D.N.Y. 1938). It is the objective manifestation of intent upon which the opposing party may rely. The question should be determined by the trier of facts based on the evidence in each case. *Burton-Dixie, supra; Weight Watchers, supra.* An appellate court should accept such factual determination if supported by substantial evidence. *Burton-Dixie, supra; Galion Iron Works, supra.*

In *Cornell, supra*, the trial court denied a stay under 9 U.S.C. § 3, because the party was "in default in proceeding with such arbitration," and stated:

> A party waives his right to arbitrate when he actively participates in a lawsuit or takes other action inconsistent with that right. Once having waived the right to arbitrate, the party is necessarily "in default in proceeding with such arbitration."
>
> Before filing the present motion, appellant (1) moved for a transfer of venue to the Eastern District of Pennsylvania, (2) filed an answer to appellee's complaint and a counterclaim, and (3) filed notice of depositions, took the deposition of an official of appellee, and procured the production of various records and documents. As the District Court stated:
>
> > [T]he litigation machinery had been substantially invoked and the parties were well into the

> preparation of a lawsuit by the time (same four months after the complaint was filed) an intention to arbitrate was communicated by the defendant to the plaintiff.

360 F.2d at 513. (Footnotes omitted.)

In *Weight Watchers, supra,* the court made a determination as to the elements of waiver in these cases, stating:

> The factors upon which the waiver question appears to have turned most frequently against the party seeking to compel arbitration are his dilatory conduct in seeking arbitration, usually coupled with his gaining of an undue advantage in the judicial forum or other substantial prejudice to the opposing party, or any other actions taken by the moving party which are sufficiently inconsistent with his seeking arbitration. Examining the circumstances of a particular case, it is usually the absence of one or more of these factors that forms the basis for concluding there has been no waiver.

398 F. Supp. at 1059. (Footnotes omitted.)

As a basis for holding that waiver had been correctly determined, the court in *Burton-Dixie, supra,* stated the evidence to be as follows:

> [A]t no time before answering the complaint in the instant lawsuit did McCarthy demand that the matter be submitted to the architect or to arbitration. Even when Burton-Dixie filed suit against McCarthy, McCarthy did not attempt to invoke the arbitration provision in the contract. In its answer to the complaint, McCarthy did not ask the court to stay proceedings pending arbitration, but rather denied liability and set up as an affirmative defense Burton-Dixie's failure to arbitrate. Moreover, McCarthy impleaded as third-party defendants two of

its subcontractors and proceeded to litigate the dispute over the defective roof.

436 F.2d at 408-409. The court concluded that McCarthy waived its right to insist upon arbitration.

The United States Court of Appeals in *Demsey, supra*, after analyzing numerous cases which hold that there was no waiver under the particular facts, stated:

> We have found no cases, however, where arbitration has been allowed after a party has answered on the merits, asserted a cross-claim that was answered, participated in discovery, failed to move for a stay, and gone to trial on the merits.
>
> We can think of no clearer case of prejudice than we have here in this case. The substantial expense to all concerned that was involved in the trial of all the factual and legal issues in the case, including those raised by Jordan's cross-claims, was caused by Jordan's full participation in the pretrial procedures and in the trial on the merits, despite its mere allegation of the arbitration clause in the voyage charter as a defense. We think it would be a gross miscarriage of justice now to require a retrial by arbitration of any of these issues.

461 F.2d at 1018.

In *Gavlik Const. Co.* v. *H. F. Campbell Co.*, 526 F.2d 777, 783 (3d Cir. 1975), the court stated: "Recent cases have only found waiver where the demand for arbitration came long after the suit commenced and when both parties had engaged in extensive discovery." (Citing *Demsey, supra; American Locomotive* v. *Gyro, supra; Ernst, supra; Liggett, supra;* and *Sulphur Export, supra.*)

Failing to invoke arbitration for ten months from the date the suit was commenced, while at the same time obtaining many benefits from pre-trial discovery that would not have been available had they reasonably de-

manded arbitration, was held to constitute waiver of the arbitration provision in *Liggett, supra.* The parties demanding arbitration had answered and counterclaimed without asserting their right to arbitration, but they had actively participated in the discovery process and obtained a number of extensions. The court held that their acts and conduct had been prejudicial and thus constituted waiver.

In *E. C. Ernst, supra,* the court found waiver, stating:

> When one party reveals a disinclination to resort to arbitration on any phase of suit involving all parties, those parties are prejudiced by being forced to bear the expenses of a trial, which in this case was quite lengthy. Arbitration is designed to avoid this very expense. Substantially invoking the litigation machinery qualifies as the kind of prejudice to Manhattan that is the essence of waiver. (Citations omitted.)

559 F.2d at 269.

A party to a lawsuit who claims the right to arbitration must take some action to enforce that right. *Burton-Dixie, supra.* This must be done within a reasonable time after suit is filed. *Demsey, supra; American Locomotive* v. *Gyro, supra.*

The courts have held a variety of acts to be inconsistent with a party's alleged reliance on arbitrating the dispute in question. The determination of waiver seldom turns on a single inconsistent act or failure to act. Some of the conduct or acts of a party in relationship to a claim subject to arbitration that have been considered by themselves, or in conjunction with others, to constitute default or waiver are as follows: Answering a complaint, *Demsey, supra; Cornell, supra; Weight Watchers, supra; Liggett, supra;* counterclaiming in a judicial proceeding, *Demsey, supra; Cornell, supra; American Locomotive* v.

Gyro, supra; Liggett, supra; filing a complaint, *Gutor International supra; Bank of Madison* v. *Graber*, 158 F.2d 137 (7th Cir. 1946); *Galion Iron Works, supra;* participating in a discovery process in a lawsuit, *Demsey, supra; Cornell, supra; Liggett, supra;* moving for summary judgment, *Weight Watchers, supra;* going to trial on the merits, *Demsey, supra; Blake Construction Company* v. *United States*, 252 F.2d 658 (5th Cir. 1958); *Radiator Speciality Co.* v. *Cannon Mills*, 97 F.2d 318 (4th Cir. 1938).

Preparation for trial by a party based on the belief that the other party does not desire or intend to make a demand for arbitration has been held to constitute substantial prejudice which may invoke a waiver or constitute a default under the Federal Arbitration Act. *Demsey, supra; Weight Watchers, supra.*

The courts also consider any advantage that may have been received by a party that might not otherwise have been available to the party under an arbitration proceeding by reason of participating in the discovery process. *Liggett, supra.* Neither the federal statutes nor the rules of AAA give a party an absolute right to demand discovery. As a general rule, discovery is very limited in arbitration proceedings. Once a district court has stayed judicial proceedings pending arbitration, the parties may not continue discovery in the district court. *Mississippi Power Company* v. *Peabody Coal Company*, 69 F.R.D. 558 (S.D. Miss. 1976); *Commercial Solvents Corp.* v. *Louisiana Liquid F. Co.*, 20 F.R.D. 359 (S.D.N.Y. 1957); *Cavanaugh* v. *McDonnell & Company*, 357 Mass. 452, 258 N.E.2d 561, (1970). In *Bigge, supra*, a federal district court did enforce discovery which had been ordered by the arbitrator, but did so on a showing of necessity rather than of mere convenience. Later cases have denied discovery, but, based on *Bigge, supra*, have indicated that discovery might be proper in extraordinary circum-

stances. *Coastal States Trading, Inc.* v. *Zenith Nav. S.A.*, 446 F. Supp. 330 (S.D.N.Y. 1977); *Levin* v. *Ripple Twist Mills, Inc.*, 416 F. Supp. 876 (E.D. Pa. 1976).

Discovery procedures are often the most expensive and time consuming elements of a court trial, and thus have often been considered to be inconsistent with the reasons for arbitration. *Commercial Solvents, supra.* In most cases, discovery in arbitration is limited to the discovery available under the Arbitration Act itself. M. Domke, The Law and Practice of Commercial Arbitration, § 27.01 (1968); G. Goldberg, A Lawyer's Guide to Commercial Arbitration, § 3.03 (1977). The only discovery mentioned in the Act is the taking of depositions of witnesses who cannot be subpoenaed or who are unable to attend the hearing.

No one act or a specific series of acts has been held consistently to indicate waiver. The courts have looked to the totality of the proof in each case to arrive at a decision. We take into consideration all of the material facts to determine whether GAC defaulted on its obligation to make a timely demand for arbitration and a stay of proceedings and thus waived its rights.

We ask whether GAC intended to arbitrate or litigate. However, it would be a mistake to assume that each of these courses is mutually exclusive of the other. We must inquire whether it can be inferred from the circumstances that the intent of GAC was to litigate *and* arbitrate. The purpose could plausibly be to preserve the right to arbitrate and at the same time litigate down to the last possible moment. Thus, we examine not only the acts of GAC that occurred prior to the time the injunction was entered on April 2, 1976 but the conduct or inaction of GAC thereafter as bearing on the real designs of the company.

It is hornbook law that intent is a state of mind. As such, it generally remains hidden within the brain where it was conceived. It is rarely, if ever, susceptible of proof by direct evidence. It must be inferred from the words, acts or conduct of the party entertaining it as well as the other attendant facts and circumstances. No citations as to these principles are necessary.

In applying the above law to the facts in this case we consider the challenges specified by GAC. As to waiver, GAC challenged six of the district court's findings of fact that: (a) the preliminary injunction did not prohibit GAC from demanding arbitration in the district court; (b) for twenty-seven months GAC did not "in any way manifest its intention or desire to arbitrate rather than litigate"; (c) GAC made numerous motions for extensions and discovery orders and "represented to the district court that such orders were necessary for its preparation for trial"; (d) information obtained from UNC by GAC by way of discovery would not otherwise have been available to it; (e) UNC had been prejudiced and would be irreparably injured if a stay were ordered; and (f) GAC was in default and had relinquished any rights to arbitrate.

(a) The extent to which GAC was *prohibited*, if at all, by the injunction from making demand for arbitration and from requesting a stay of the proceedings in the district court is a very crucial matter with GAC. That company contends that the injunction absolutely prohibited it from demanding arbitration outside New Mexico and that arbitration within New Mexico was ordered to be conducted only under the supervision of the district court. GAC argues that this was such a violation of its rights that it had no duty to pursue the matter further in the trial court. GAC claims that its actions after the issuance of the injunction were strictly in self-defense and were forced upon it by the illegally obtained injunction.

It is further claimed by GAC that its actions prior to the issuance of the injunction on April 2, 1976 were not such as would justify a finding of waiver and that most of the conduct of GAC upon which UNC relies for support of its allegation of waiver occurred after GAC was unlawfully restrained from seeking arbitration.

We look at all the evidence. The hearing on April 2, 1976 on the motion for an injunction is most significant. The motion did not contain any plea for restraining arbitration; and the temporary restraining order mentioned only restraints on suing or counterclaiming. The first time that the record shows notice to GAC that the court was even considering enjoining arbitration demands was in the judge's letter of March 30, three days before the hearing. However, GAC did not object to holding the hearing insofar as it pertained to arbitration, did not demand arbitration in the interim, did not seek to continue the hearing while it took the proper steps to demand arbitration and to request a stay in the suit, and did not raise the issue of its rights under the Federal Arbitration Act at the hearing on the motion.

The reliance of GAC on § 44-7-2 of the New Mexico Uniform Arbitration Act, which provides for an automatic stay of court proceedings pending arbitration on "application therefor", indicates that GAC was fully aware of this simple means of putting an immediate halt to the litigation, yet its lawyers talked only of the "possibility of arbitration". Bearing in mind that the colloquy among lawyers and judge may not ordinarily be considered to dispute the judgment, it is still admissible as being indicative of the intent of GAC, with regard to arbitration as opposed to litigation upon which UNC and the court were entitled to rely. GAC only alerted the court to its right to demand arbitration under the New Mexico Uniform Arbitration Act, where it would be entitled to an automatic stay in the event that

it demanded arbitration, and made references only to arbitration "in this case". Thus, another well-known risk was taken by GAC, i.e., that it would not later be permitted to complain because of failing to properly object. N.M.R. Civ. P. 46, N.M.S.A. 1978; N.M.R. Civ. App. 11, N.M.S.A. 1978

Although the court offered clarification of what was meant by a right to arbitrate "in this forum", none was ever requested at that time or any later time, nor was any effort made to determine what the judge meant when he said that if GAC decided to exercise its rights to arbitration it would be done "subject to the supervision of this court." The latter expression could be interpreted in many ways, one of which could be that the judge believed that he had the power to refuse to stay the proceedings if the evidence showed a default on GAC's part in demanding arbitration that amounted to a waiver. Another probability is that the court would want to retain jurisdiction over any contested items in the contract that were not subject to arbitration. Furthermore, the court would have the jurisdiction to inquire whether or not there was in fact a valid contract providing for arbitration. No clarification was sought and none was thereafter offered.

There is nothing in the preliminary injunction that prohibited GAC from demanding arbitration at any time by serving a demand on UNC in New Mexico, without regard for the location at which the arbitration would take place. This would have set the stage for a claim by GAC that the court did not have jurisdiction. The argument that GAC could do nothing with regard to arbitration is not persuasive. Nor is the claim that it had to await the decision of the U. S. Supreme Court before it could make any demands for arbitration. The U. S. Supreme Court decision did not change the portion of the

preliminary injunction giving GAC the right to demand arbitration in New Mexico.

Common sense dictates that a litigant that has been so capably represented by such a host of outstanding lawyers, who have meticulously handled every other infinitesimal detail, and who have verbally displayed such ferocious passion for arbitration, could have found a way to say: "Judge, we want to arbitrate." There were no restraints on filing a motion in the trial court for leave to arbitrate. Admittedly, it is not called for under the federal law, but the failure of GAC to adopt such a simple and plausible course of action is a commentary on the validity of its claimed intent to arbitrate.

Inherent in GAC's argument is the impermissible presumption that if it had made demand for arbitration the trial court would have acted unlawfully rather than follow the mandate of the Federal Arbitration Act. We must presume that the court would have done its "supervision" in accordance with that law. The law presumes that rulings of district courts have validity. *Coastal Plains Oil Company* v. *Douglas*, 69 N.M. 68, 364 P.2d 131 (1961); *Carlile* v. *Continental Oil Company*, 81 N.M. 484, 468 P.2d 885 (Ct. App. 1970). *A fortiori*, the law must presume that rulings which district courts may be called upon to make in the future will likewise be valid.

As suggested by GAC, the court's finding that the preliminary injunction did not prohibit GAC from demanding arbitration with UNC *"in this forum"* shows a tinge of legal conclusion. The thrust of GAC's challenge to this finding is more in the nature of a complaint that it was wrong for the court to prohibit arbitration *in other forums*. The U.S. Supreme Court agreed with this theory; however the finding, or the mixed finding and conclusion, is obviously correct because the prohibition did not run against demanding arbitration with

UNC in New Mexico. In order to assert any right to arbitration under 9 U.S.C. § 3, it was mandatory that GAC make a demand for arbitration and make application to the Santa Fe County District Court for a stay in these proceedings, at which time the trial court would have been obligated under federal law to determine whether GAC was in default in demanding arbitration. This is exactly what occurred after the U.S. Supreme Court mandate came down.

Early in its appeal, GAC, in discussing the scope of review available to this Court, argued that we should not apply the substantial evidence rule. The argument is, since the trial judge reached his findings by the use of documentary evidence, the pleadings and the statements of the attorneys, this Court is in as good a position to determine the facts by preponderance of the evidence as was the trial judge. We think this case is not a good subject for the application of that principle. We hold that *Valdez* v. *Salazar*, 45 N.M. 1, 107 P.2d 862 (1940) is more in point where this Court stated:

> Where all or substantially all of the evidence on a material issue is documentary or by deposition, the Supreme Court will examine and weigh it, and will review the record, giving some weight to the findings of the trial judge on such issue, and *will not disturb the same upon conflicting evidence unless such findings are manifestly wrong or clearly opposed to the evidence.* (Emphasis added.)

Id. at 7, 107 P.2d at 865.

We affirm the trial court's ruling that the preliminary injunction did not prohibit GAC from demanding arbitration in that court.

(b) GAC filed numerous pleadings which stated that it did not intend to waive its rights to arbitration. However, the trial court found that for a period of twenty-

seven months GAC did not "in any way manifest its *intention or desire* to arbitrate rather than litigate the issues between the parties arising under the 1973 Supply Agreement." (Emphasis added.) GAC's intentions are the number one question in this case. GAC claims that its numerous statements that it did not intend to *waive its right* to demand arbitration was sufficient to establish its intent. UNC urges that an intention to *preserve the right to demand arbitration* is not the same as an intention or desire *to arbitrate.* UNC relies on the other acts and conduct of GAC to prove that a good faith intent to arbitrate was not shown.

The record shows that GAC was fully aware of the perils of dilatory conduct in asserting its arbitration rights. This knowledge surfaced in its first pleading. However, it took obvious risk after obvious risk. It did not assert arbitration as an affirmative defense in its answer, thus taking the chance of having the issue excluded under N.M.R. Civ. P. 8(c) and 12(b), N.M.S.A. 1978, which call for every defense in law or fact to be "asserted." "The failure to plead the arbitration clause as a defense to the lawsuit will be considered a waiver of the party's rights arising under such clause." M. Domke, *supra.* § 19.01, page 181 (1968); *Almacenes Fernandez, S.A.* v. *Golodetz,* 148 F.2d 625 (2d Cir. 1945). Generally the courts have held that failure to plead an affirmative defense results in the waiver of that defense; and it is excluded as an issue. *Radio Corporation of America* v. *Radio Station KYFM, Inc.,* 424 F.2d 14 (10th Cir. 1970).

GAC further imperiled its position by failing to assert arbitration as a defense in the pre-trial order. Parties are expected to disclose at a pre-trial hearing all legal and factual issues which they intend to raise in the lawsuit. N.M.R. Civ. P. 16, N.M.S.A., 1978; *Becker* v. *Hidalgo,* 89 N.M. 627, 556 P.2d 35 (1976); *Harvey* v.

Eimco Corp., 33 F.R.D. 360 (E.D. Pa. 1963); *Burton* v. *Weyerhaeuser Timber Co.*, 1 F.R.D. 571 (D. Ore. 1941). The parties are limited to the issues contained in the order and must not introduce issues not so contained at trial. *Fowler* v. *Crown-Zellerbach Corporation*, 163 F.2d 773 (9th Cir. 1947).

Although these two lapses by GAC and others cited are not conclusive of voluntary waiver, they do add to the volume of proof that the court and UNC were misled into believing that GAC intended to litigate the issues and that its intent to arbitrate was not as strong as it now contends.

An attempt to reserve a right inconsistent with that asserted is ineffectual. *The Belize, supra; Commercial Bank* v. *Central Nat. Bank*, 203 S.W. 662 (Mo. App. 1918).

There was no error in the trial court's finding that GAC did not manifest an intention and desire to arbitrate, as opposed to litigating. The finding is based upon substantial evidence. We will not disturb such a finding. *Montoya* v. *Travelers Ins. Co.*, 91 N.M. 667, 579 P.2d 793 (1978).

(c) The court's finding that GAC made repeated representations to the district court that it needed extensions of time and in "all" instances said the purpose was to enable it to "prepare for trial", is challenged on grounds that most of the acts occurred after the issuance of the preliminary injunction and that *every* such action was not accompanied by the alleged representation. However, GAC failed to comply with N.M.R. Civ. App. 9(d), N.M.S.A. 1978, which requires that the substance of all the evidence be stated with proper transcript references. The same is true of GAC's challenges to the court's findings that UNC had provided *all* materials to GAC sought on discovery and that GAC obtained

"huge amounts of information from UNC which would not otherwise be available to it." We hold that challenges (c) and (d) fell short of complying with Rule 9(d) and will not be considered. *Perez* v. *Gallegos*, 87 N.M. 161, 530 P.2d 1155 (1974); *Galvan* v. *Miller*, 79 N.M. 540, 445 P.2d 961 (1968). However, as to the merits of the two challenges, careful scrutiny of the record discloses insubstantial support for the contentions. Even if error had been committed as to one or both issues, it would not be dispositive of the case.

(e) The court's finding that UNC had been prejudiced by GAC's default in demanding arbitration is attacked on the basis that there was no such prejudice shown by the events prior to the entry of the injunction against arbitration and that, after the entry of that injunction, GAC's conduct could not be considered in determining waiver. This issue is partially resolved by our holding that there is substantial evidence that GAC did not properly manifest its intention or desire to arbitrate during a period of twenty-seven months from the time of the filing of the first lawsuit to a point well into the trial of the second case.

By that time, UNC had spent millions of dollars on discovery proceedings and trial preparation. UNC takes the position that GAC obtained the advantages of discovery that would not have been available to GAC as a matter of right under the Federal Arbitration Act.

GAC argues that the court's findings of prejudice should be categorized as a legal conclusion and that it was not incumbent upon GAC to establish the lack of an evidentiary basis for the finding as required by Rule 9(d). Even though it is for the court to conclude whether there is prejudice, it is clear that a conclusion must be based on findings of fact that have support in the record. The conclusion fails when it is demonstrated that it has no proper support in the facts. Even though the

substantiality of the evidence on this point may not be properly before us, we nevertheless hold on the merits that the evidence in the record substantiates a finding that GAC's default in demanding arbitration caused material prejudice to UNC both before and after the preliminary injunction was issued.

(f) The last finding challenged is that GAC was in default and had relinquished any right to arbitrate. This finding overlaps many of the others. This holding must be predicated upon finding substantial evidence from the entire record.

This complex, multi-party, multi-issue litigation was within days of final solution at the trial level when the first *demand* was made for arbitration. This very simple act of stating, in writing: "We want to arbitrate", followed by a motion for a stay of litigation, would have challenged the jurisdiction of the court to proceed. Our search of the record reveals no instance where these words were either written or spoken until November of 1977.

Without reiterating the facts relied upon, we hold that there is substantial evidence to support the court's finding that GAC was in default and thus waived its right to arbitration.

The parties expressly provided that the AAA Rules would govern arbitration under the 1973 Uranium Supply Agreement. GAC claims that waiver is entirely precluded under § 46(a) of these rules which specifies:

> No judicial proceedings by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

GAC relies upon *People ex rel. Delisi Const. Co., Inc.* v. *Board of Ed.*, 26 Ill. App. 3d 893, 326 N.E.2d 55 (1975). This case is distinguishable in that it involved a

delay by the party seeking arbitration only for a period during which the validity of the contract to arbitrate was being decided, as opposed to trial preparation and trial in our case. Furthermore, the Illinois Court recognized that only arbitrable questions are covered by § 46(a) by stating:

> Moreover, the arbitration clause provides that *arbitrable questions* be decided "in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association . . . (Emphasis added.)

326 N.E.2d at 57.

UNC cites M. Domke, *supra*, at 264, to support its contention that Rule 46(a) is designed only to provide that, after arbitration has been commenced, there is no waiver by participation in judicial proceedings *supplementary to* and *in aid of arbitration*. UNC argues that, regardless of the AAA Rule, a party may be in default in demanding arbitration, as specifically mentioned in the Federal Arbitration Act, and therefore, have no arbitrable questions remaining which could be governed by § 46(a). In the latter situation, it is the province of the court to determine whether there has been a default. The parties are precluded from contracting to exclude the court from jurisdiction over this issue. *American Sugar Refining Co.* v. *The Anaconda*, 138 F.2d 765 (5th Cir. 1943), *aff'd*, 322 U.S. 42 (1944); *Ocean Science & Eng., Inc.* v. *International Geomarine Corp.*, 312 F. Supp. 825 (Del. 1970).

4. *Procedural Issues*

GAC argues that the procedures followed by the court below in arriving at a decision were defective in that (a) the court below failed to exercise its independent judicial discretion in entering its findings and conclusions;

and (b) the court erred in disposing of GAC's arbitration claim without a trial-type evidentiary hearing.

(a) GAC states that the findings of fact and conclusions of law were adopted entirely from the proposed findings and conclusions submitted by UNC. GAC argues that this procedure was in violation of N.M.R. Civ. P. 52(B)(a)(5) and (7), N.M.S.A. 1978, and also in violation of the leading case law.

In reviewing the cases cited by GAC it appears that the practice of adopting findings and conclusions entirely as submitted by one of the parties has been held to be error in only the most extreme circumstances. *See Mora* v. *Martinez*, 80 N.M. 88, 451 P.2d 992 (1969); *Chicopee Manufacturing Corp.* v. *Kendall Company*, 288 F. 2d 719 (4th Cir. 1961), *cert. denied*, 368 U.S. 825 (1961). Most of the cases hold that, although the practice is not to be commended, it is not reversible error so long as the finding adopted are supported by the record. *United States* v. *El Paso Gas Co.*, 376 U.S. 651 (1964); *U.S.* v. *Crescent Amusement Co.*, 323 U.S. 173 (1944); *Bradley* v. *Maryland Casualty Company*, 382 F.2d 415 (8th Cir. 1967). The prodigious record in this case provides ample support for the court's findings.

The court entered an order expressly refusing all requested findings and conclusions inconsistent with those announced in its decision. GAC urges that there was a failure to strictly comply with Rule 52(B)(a)(5) since the judge did not mark GAC's requested findings and conclusions "refused". We find no prejudice and thus no reversible error. *Martinez* v. *Research Park, Inc.*, 75 N.M. 672, 410 P.2d 200 (1966), *rev'd on other grounds*, 86 N.M. 151, 520 P.2d 1096 (1974).

As to Rule 52(B)(a)(7), GAC argues that the court adopted the findings and conclusions offered by UNC and, by separate order, refused GAC's "inconsistent" findings

and conclusions. The gist of this argument is that this violates the single document requirement of the rule. However, the word "decision" as used in Rule 52 means "findings of fact and conclusions of law." *Trujillo* v. *Tanuz*, 85 N.M. 35, 38, 508 P.2d 1332, 1335 (Ct.App. 1973). Rule 52 contains no requirement that an order *refusing* proposed findings be included in the same document as the court's decision.

(b) GAC's motion for a stay requested a hearing. The trial court gave the parties short notice to submit affidavits and briefs on the facts and the law, but did not hear oral argument or testimony. GAC did not object at the trial level to the sufficiency of the hearing, did not complain that it was being deprived of due process, and did not tender any additional evidence in support of the motion. This issue is raised for the first time on appeal. GAC now argues that it was entitled to a trial-type hearing, claiming that the Federal Arbitration Act and the constitutional due process clauses require such a hearing. The question, however, is what type of hearing is "appropriate to the nature of the case." *Mullane* v. *Central Hanover Tr. Co.*, 339 U.S. 306, 313 (1950). We must look to the Federal Arbitration Act and the cases interpreting it.

Section 3 of the Federal Arbitration Act provides for a stay of pending court action on application of one of the parties when the trial court is satisfied that the issue involved is referrable to arbitration and that the applicant for the stay of court proceedings is not in default in proceeding with such arbitration. Section 4 of the Act, on the other hand, contemplates a situation where no court action is pending. It allows for a party to petition any *United States District Court* for an order to compel arbitration, and provides for jury trial. *Prima Paint* v. *Flood & Conklin*, 388 U.S. 395 (1967) held that, under either section, a federal court may consider only issues

relating to the making and performance of the agreement to arbitrate. In that case, the Court said nothing regarding the procedures to be followed in deciding those limited issues.

Section 6 of the Federal Arbitration Act states: "Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided." Section 4 is the only exception to § 6. *World Brillance, supra.*

Section 4 provides: "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed. . . ." By its literal language, § 4 is applicable only to United States District Courts. *See Robert Lawrence*, 271 F.2d at 407. We have found no authority which indicates that a party may petition a state court for an order to compel arbitration under § 4 of the Federal Arbitration Act. We therefore conclude that § 4 is not applicable to this case.

Except for claims brought pursuant to § 4 of the federal act, claims under that act are to be heard as motions rather than by trial. *World Brilliance, supra.* "Motions may be decided wholly on the papers, and usually are, rather than after oral examination and cross-examination of witnesses." *Id.* 342 F.2d at 366. Contrary to the arguments of GAC, *Prima Paint, supra*, does not change the import of the decision in *World Brilliance.*

GAC claims that the failure to accord it a hearing was a violation of its due process rights. The requirements of due process are not technical, and no particular form of procedure is necessary for protecting substantial rights. *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974). The circumstances of the case dictate the requirements. *Rivera-Lopez* v. *Gonzalez-Chapel*, 430 F. Supp. 704

(D. Puerto Rico 1975). The integrity of the fact-finding process and the basic fairness of the decision are the principal considerations. *Boykins* v. *Fairfield Board of Education*, 492 F.2d 697 (5th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). Oral argument on a motion is not a due process right. *Spark* v. *Catholic University of America*, 510 F.2d 1277 (D.C. Cir. 1975); *Skolnick* v. *Spolar*, 317 F.2d 857 (7th Cir. 1963), *cert. denied*, 375 U.S. 904 (1963).

In our case, the trial judge was ending the second month of the trial on the merits, and had virtually lived with the participants in this controversy for over two years at the time the ruling complained of was made. The record was approaching the 10,000 page point, and exhibits were running into the hundreds of thousands of pages and were being measured by the running foot.

The parties had full opportunity to brief the facts and the law, and they filed extensive briefs with the court before this decision. Both sides filed requested findings of fact and conclusions of law.

Although UNC claims that GAC waived its right to a hearing by failing to properly object and alert the court to the right, if it had such right, we do not decide the issue of waiver. We hold instead that the hearing held by the court was "appropriate to the nature of the case". *Mullane*, *supra*; *World Brilliance*, *supra*; 9 U.S.C. § 6.

5. *Inconsistency of Proceedings*

GAC cliams that the actions of the trial court were inconsistent with the holdings of the U.S. Supreme Court in *General Atomic Co.* v. *Felter*, 434 U.S. 12 (1977). This bears on the district court's determination not to stay the trial on the grounds that GAC had waived its right to arbitrate and that the New Mexico antitrust claims were not arbitrable as a matter of law.

In *General Atomic*, the Supreme Court ruled that, "it is not within the power of state courts to bar litigants from filing and prosecuting *in personam* actions in the federal courts." 434 U.S. at 12. The district court then modified its April 2, 1976, injunction to exclude from its terms and conditions all *in personam* actions in federal courts "and all other matters mandated to be excluded from the operation of said preliminary injunction by the Opinion of the United States Supreme Court, dated October 31, 1977."

The district court had jurisdiction over the arbitration controversy under the Federal Arbitration Act, at least up to approximately sixty days into the trial of the case on the merits, when GAC made demand for arbitration and moved for a stay in the proceedings. When GAC sought a stay the trial court had the obligation to determine whether the issues involved in the suit were referrable to arbitration under the agreements, and whether "the applicant for the stay is not in default in proceeding with such arbitration. . . ." 9 U.S.C. § 3. The trial judge made these determinations in favor of UNC. There is nothing in the Supreme Court's decision that prohibits this type of disposition since it comports with the federal statutes.

There was nothing in the amended injunction which prohibited GAC from demanding arbitration in the case to be conducted in any location, so long as an application was made to the district court to stay the pending trial. The Federal Arbitration Act prevented GAC from proceeding with arbitration without an order from Judge Felter. 9 U.S.C. § 3.

Furthermore, in *General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978), decided after argument in this case, the Court observed: "Clearly, our prior opinion did not preclude the court from making findings concerning whether GAC had waived any right to arbitrate. Nor did our prior decision prevent the Santa Fe court . . . from declining to stay its own trial."

6. *Arbitration of State Antitrust Laws*

The trial court held that claims raised under the New Mexico Antitrust Act, 57-1-1 to 6, N.M.S.A. 1978, were not arbitrable and that other claims in the suit were so intertwined with the antitrust claims, that none were arbitrable. Although we consider that our decision that GAC has waived its arbitration rights is controlling, in the interest of judicial economy, we decide the antitrust questions.

Even though the Federal Arbitration Act contemplates that *all* claims are arbitrable where there is a contract to arbitrate, the federal courts have established an exception where the federal antitrust laws are concerned. In reconciling two strong and conflicting federal policies, the federal courts have established the rule that claims under the Federal Antitrust Act are not arbitrable under the Federal Arbitration Act. *Applied Digital Tech., Inc.* v. *Continental Cas. Co.*, 576 F.2d 116 (7th Cir. 1978); *Cobb* v. *Lewis*, 488 F.2d 41 (5th Cir. 1974); *Power Replacements, Inc.* v. *Air Preheater Co.*, 426 F.2d 980 (9th Cir. 1970); *American Safety Equipment Corp.* v. *J. P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968). The New York courts have held that claims arising under that state's antitrust act were not arbitrable under the New York Arbitration Act. *Schachter* v. *Lester Witte & Co.*, 52 A.D.2d 121, 383 N.Y.S.2d 316 (1976), *aff'd on other grounds*, 396 N.Y.S.2d 175, 364 N.E.2d 840 (1977); *Aimcee Wholesale Corp.* v. *Tomar Products, Inc.*, 21 N.Y.2d 621, 237 N.E.2d 223 (1968). We found no case on the issue of whether state antitrust claims are arbitrable under the Federal Arbitration Act. The parties cited none.

GAC argues that, by virtue of the supremacy clause of the United States Constitution, state antitrust claims cannot be applied to bar arbitration under the Federal Arbitration Act. We do not agree.

The policies underlying both federal and state antitrust laws are concurrent, as indicated by the legislative history of the federal act. During the debates on the federal legislation, Senator Sherman commented:

> Each State can and does prevent and control combinations within the limit of the State. This we do not propose to interfere with. The power of the State courts has been repeatedly exercised to set aside such combinations. . . .

21 CONG. REC. 2456 (1890).

Senator Sherman further stated that the act was designed to "arm the Federal courts . . . that they may co-operate with the State courts in checking, curbing, and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States . . ." and that the Act was "in this way to supplement the enforcement of the established rules of common and statute law by the courts of the several States." 21 CONG. REC. 2457 (1890).

Twenty-one states had constitutional or statutory antitrust laws when the Sherman Antitrust Act was passed on July 2, 1890. 26 Stat. 209. 15 U.S.C. § 1 *et seq.* Very shortly thereafter in 1891, the Territorial Legislature of New Mexico passed an antitrust act in which the pertinent and material language is almost identical with the federal law. Chapter 10, § 1 *et seq.*, page 28, *Acts of the Legislative Assembly of the Territory of New Mexico*, 1891. The New Mexico Constitution in Article IV, § 38, later provided that the Legislature "shall enact laws to prevent trusts, monopolies and combinations in restraint of trade."

To further emphasize the common purpose underlying antitrust enforcement and the cooperation between federal and state authorities, we note that as late as the 95th Congress $11 million in federal grants were made

available to aid the states in improving antitrust enforcement. Pub.L. 95-86. *See* S. Rep. No. 95-285 to accompany H. R. 7556, 95th Cong., 1st Sess. 18 (1977).

The underlying purposes behind both the federal and state Laws are the same, to establish a "public policy of first magnitude"; that is, promoting the national interest in a competitive economy. *American Safety Equipment, supra.* We perceive no "clash of competing fundamental policies" between the two statutes as GAC claims. We are convinced by the basic policy considerations expressed in the federal and New York cases holding that antitrust issues are not arbitrable. *American Safety Equipment, supra; Aimcee, supra.* The cases have developed a body of law that is supportive of an integrated federal-state policy mandating that our courts not abdicate their control over antitrust policy. *Aimcee, supra.*

The rationale for this principle is well-stated in *American Safety Equipment, supra.* The court reasoned that a claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy. The plaintiff is likened to a private attorney-general who protects the public's interest. Violations can affect hundreds of thousands—perhaps millions—and inflict staggering economic damage. "We do not believe that Congress intended such claims to be resolved elsewhere than in the courts." 391 F.2d at 827. The court thought it proper to ask whether contracts of adhesion between alleged monopolists and their customers should determine the forum for trying antitrust violations. "Since commercial arbitrators are frequently men drawn for their business expertise, it hardly seems proper for them to determine these issues of great public interest." *Id.* at 827. It would surely not be a way of assuring the customer that objective and sympathetic considerations would be given to this claim. The court stated:

> We conclude only that the pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make the outcome here clear.

Id. at 827-28.

The validity of these reasons does not vanish simply by exchanging the federal judge for one in a state court who is charged with the same responsibility to enforce a strong public policy against monopolistic practices.

"It is now cardinal doctrine that the public interest in the enforcement of antitrust laws makes antitrust claims inappropriate subjects for arbitration." *Hunt* v. *Mobil Oil Corporation*, 410 F. Supp. 10, 25 (S.D.N.Y., 1976), *cert. denied*, 434 U.S. 984 (1977). This strong language leaves no room for argument that, if you swap a large judge for a small one, public interest disappears.

The New York Court of Appeals in *Aimcee, supra*, held that the enforcement of the state's antitrust policy was of such extreme importance to all of its people that commercial arbitration was not a fit instrument for the determination of these controversies. The court reasoned that arbitrators are not bound by rules of law, and their decisions are essentially final. The awards may not be set aside for misapplication of the law. Records need not be kept upon which a review of the merits may be had. Arbitrators are not obliged to give reasons for their rulings or awards. The courts may be called upon to enforce arbitration awards which are directly at variance with the statutory law and the public policy as determined by the decisions of the court. *See generally Applied Digital, supra; Cobb, supra; Power Replacements, supra; American Safety Equipment, supra; Aimcee, supra*; and *Annot.*, 3 A.L.R. Fed. 918, § 2 (1970).

GAC cites several cases which hold that, in enacting the Federal Arbitration Act, Congress created federal substantive law which controls over inconsistent state

substantive law. *E.g. Grand Bahama Petroleum Co.* v. *Asiatic Petroleum*, 550 F.2d 1320 (2d Cir. 1977); *Commonwealth Edison Co.* v. *Gulf Oil Corp.*, 541 F.2d 1263 (7th Cir. 1976); *Stokes* v. *Merrill Lynch, Pierce, Fenner & Smith*, 523 F.2d 433 (6th Cir. 1975); *Lawn* v. *Franklin*, 328 F. Supp. 791 (S.D.N.Y. 1971). In each of the cases cited by GAC, however, the Federal Arbitration Act was held to control over various *conflicting* state laws, other than state antitrust statutes.

We hold that the enforcement of state antitrust law by the courts rather than by arbitrators is entirely consistent with congressional intent because (1) the state and federal antitrust acts serve to protect the same societal interests, and (2) the Federal Arbitration Act itself provides that arbitration agreements in contracts involving commerce are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

Title 9 U.S.C. § 2 has been construed by several courts. *Litton FCS, Inc.* v. *Pennsylvania Turnpike Commission*, 376 F.Supp. 579 (E.D. Pa. 1974), *aff'd by order*, 511 F.2d 1394 (3d Cir. 1975), turned on whether a state agency had authority to enter into the particular contract. The District Court held that before a state may limit conditions under which a public instrumentality, otherwise possessing the power to arbitrate, may contract to arbitrate, it must do so in a clear and express manner. The court found that the provisions of the Pennsylvania Arbitration Act did constitute an express limitation on the authority of the Turnpike Commission to contract in a manner contrary to such act. The court then held that the Federal Arbitration Act provided for the incorporation of state law governing enforceability of contracts. It is only when a state law contravenes express provisions of the federal act that the state law must fail. If state law prohibits a public instrumentality from agreeing to arbitrate in a certain manner, the

defense that the agency acted ultra vires, in agreeing to arbitrate in that manner, was available to the agency under the Federal Arbitration Act *"if such a defense would constitute 'grounds as exist at law or in equity for the revocation of any contract.'"* (Emphasis added; citation omitted). *Id.* at 587.

In *American Airlines, Inc.* v. *Louisville & Jefferson C. A. B.*, 269 F.2d 811 (6th Cir. 1959), the court reviewed the congressional intent behind the Federal Arbitration Act and stated with reference to arbitration agreements:

> [T]here appears no indication whatever of congressional intent that such agreements would be made valid, irrevocable and enforceable solely by virtue of the Federal arbitration statute.
>
> [T]he Federal Arbitration Statute was intended to declare no more than that agreements to arbitrate "involving commerce" . . . are by virtue of the Federal arbitration statute valid and enforceable, *unless by other Federal law or by State law such agreements are for other reasons to be held invalid or revocable or unenforceable.* (Emphasis added.)

Id. at 816.

The Federal Arbitration Act clearly does not require enforcement of arbitration agreements contained in contracts which are themselves void by operation of a state law which applies to contracts generally. *See Collins Radio Company* v. *Ex-Cell-O Corporation*, 467 F.2d 995 (8th Cir. 1972). Section 57-1-3, N.M.S.A. 1978, provides:

> All contracts and agreements in violation of the foregoing two sections [which prohibit monopolies and restraints of trade] shall be *void*. . . .

Since the federal and state antitrust laws protect the same interests of society, we do not perceive that Congress intended, by enacting the Federal Arbitration

Act, to require arbitration under the terms of a contract which is challenged as being in violation of the state antitrust laws. Because of the policy reasons mentioned above, we deem that issues raised under the state antitrust act are not arbitrable.

GAC argues that several issues are unrelated to the antitrust claim and are severable. They argue that the court erred in not allowing arbitration of these other issues.

Whether all issues in the case were so intertwined with antitrust issues as to prohibit arbitration was a question which was answered in the affirmative in *Hunt, supra.* Citing *American Safety Equipment, supra,* and *Cobb, supra,* the court in *Hunt* stated the question to be:

> [W]hether the antitrust issues so permeate the entire case that it would not be "easy for an arbitrator to separate the antitrust issues from the other issues in the case, and to proceed to decide the arbitrable issues without inquiry into the antitrust issues."

410 F. Supp. at 26.

The standard of review is whether the trial court abused its discretion. *Applied Digital, supra; A. & E. Plastik Pak Co., Inc.* v. *Monsanto Co.,* 396 F.2d 710 (9th Cir. 1968). A review of the record in this case clearly indicates that the issues are "complicated, and the evidence extensive and diverse. . . ." *American Safety Equipment,* 391 F.2d at 827. It would not be "easy for an arbitrator to separate the antitrust issues from the other issues in the case, and to proceed to decide the arbitrable issues without inquiry into the antitrust issues." *Cobb,* 488 F.2d at 50. The lower court did not abuse its discretion in holding that all the issues in this case are so intertwined with the antitrust issues that no issues are arbitrable.

7. *Arbitration with Duke and Commonwealth*

GAC contends that UNC has a duty to arbitrate jointly with GAC and Duke Power Company as well as Commonwealth Edison Company, two utility firms that were relying on GAC to supply them with uranium obtained from UNC under the 1973 Uranium Supply Agreement. Duke and Commonwealth had separate contracts under which GAC was obligated. However, GAC claimed that UNC's duty was to supply the uranium "in accordance with the terms and conditions" of the utility contracts. GAC urges that the arbitration clauses in the separate Duke and Commonwealth contracts are incorporated into the 1973 Uranium Supply Agreement by reference because of the above quoted language.

UNC argues that Duke and Commonwealth are not parties to this suit, that the rights and obligations as to those two companies as related to UNC cannot be litigated, and that there is nothing in any of the contracts which obligates UNC to arbitrate with GAC with regard to its duties to those two companies.

The trial court found that the Duke and Commonwealth contracts contained no arbitration agreements between GAC and UNC, and concluded that the agreements with the two utilities did not give GAC any right to demand arbitration with UNC.

Since this issue deals solely with GAC's rights to arbitrate with UNC under the terms of the 1973 Uranium Supply Agreement, it is not necessary that we address this issue. GAC has waived whatever arbitration rights it had under the 1973 Uranium Supply Agreement.

8. *Alleged Findings on Issues Not Addressed Below*

GAC complains that the court's finding that *every* extension of time sought by GAC was accompanied by a representation that the extension was needed to prepare for trial is not correct because there is no evidence that

every action was so accompanied. Error is also alleged in the finding by the trial court that UNC had furnished to GAC *all* of the materials to which it was entitled, GAC contending that the evidence indicates that UNC had made inadequate discovery. GAC further complains that there is no evidence in the record to support the finding that the information obtained by GAC in discovery would not otherwise be available to it. It is not shown that there is prejudice to GAC, even if the challenges have merit. We hold that the challenges to these three findings do not constitute material issues that affect the disposition of this case. *Alonso* v. *Hills*, 95 Cal. App.2d 778, 214 P.2d 50 (1950); *Costello* v. *Bowen*, 80 Cal. App.2d 621, 182 P.2d 615 (1947).

It was never intended that the Federal Arbitration Act be used as a means of furthering and extending delays. The policy is to eliminate the delay and expense of extended court proceedings. *Trafalgar Shipping Co.* v. *International Milling Co.*, 401 F.2d 568 (2d Cir. 1968), *Gulf Central Pipeline Co.* v. *Motor Vessel Lake Placid*, 315 F. Supp. 974 (E.D. La. 1970).

This court holds that the critical elements of inconsistent action, unwarranted delay and substantial prejudice are too prevalent in this case to avoid a holding of waiver. Thus, we affirm the decision of the trial court.

IT IS SO ORDERED.

/s/ Mack Easley
MACK EASLEY
Justice

WE CONCUR:

/s/ Dan Sosa, Jr.
DAN SOSA, JR.
Chief Justice

/s/ H. Vern Payne
H. VERN PAYNE
Justice

[Entered May 7, 1979]

APPENDIX C

IN THE DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION,
Plaintiff,

vs.

GENERAL ATOMIC COMPANY, *et al,*
Defendants.

AMENDED SANCTIONS ORDER AND DEFAULT JUDGMENT

This matter coming before the Court upon motions for sanctions and for the granting and entry of default judgments against defendant, General Atomic Company, for its failure to comply with discovery laws and orders of the Court, a motion for an evidentiary hearing upon part of the motions relating to requested sanctions, responses to the aforesaid motions, supporting affidavits and documents, and argument and authorities made and submitted by the various parties; the Court having given due study and consideration to all of the foregoing, and to the whole record and history in this litigation, including all hearings conducted on discovery questions throughout the period from December 31, 1975, to the present; the Court having further reviewed all relevant pleadings, interrogatories and answers thereto, and other relevant and credible documents and materials in this case, as well as pleadings in other related court cases; based upon all of the foregoing, this Court now concludes that the de-

fendant, General Atomic Company, has followed a conscious, willful and deliberate policy throughout this litigation, which continues to the present time, in cynical disregard and disdain of the Rules of Procedure relating to discovery and this Court's discovery Orders, of concealing rather than in good faith revealing the true facts concerning the international uranium cartel in which Gulf Oil Corporation was involved and which through its subsidiaries, officers, agents and affilates, including defendant, GAC, participated, from an as yet undetermined time, but for not less than from and during 1972 into 1975; the aforesaid policy of defendant, GAC, of hiding that information from the Court and opposing counsel, and in consequence thereof, the exercise of the utmost bad faith in all stages of the discovery process up to the present time, leads the Court to the inescapable conclusion that at this late date, the Court's discovery Orders will not be complied with by the defendant, GAC, and that this Court is powerless to secure unto all parties to this case either due process of law or a fair trial based upon equality and parity of right and duty unless sanctions under Rule 37 are imposed by the Court at this time. To require the other parties to this case to proceed further upon the trial on the merits at this time, other than upon a consideration of damages, disadvantaged as they are by the lack of discovery and GAC's failure to provide discovery, would result in a grave injustice unto all parties to this action other than GAC and a cynical denial of equal protection of the law unto them; the factual basis for imposing sanctions under Rule 37 appears from and is documented by the "Recitals" which are hereinafter set forth, which manifestly appear from the face of the record herein, without any need or requirement for an evidentiary hearing or other form of additional delay in giving effect to Rule 37, to-wit:

RECITALS

(1) On December 31, 1975, United Nuclear Corporation, plaintiff herein, by motion and leave of the Court, filed its First Set of Interrogatories to General Atomic Company in this action. Those Interrogatories were identical in scope to UNC's interrogatories filed in Cause No. 50044, Santa Fe County District Court. The definition section of those interrogatories filed herein, as well as certain questions, specifically requested information from the constituent partners of GAC, Gulf Oil Corporation and Scallop Nuclear, Inc. Those definitions were not objected to within the time allowed by Rule 33 of the New Mexico Rules of Civil Procedure, and, indeed, were never objected to by GAC.

(2) In UNC's First Set of Interrogatories, UNC asked, *inter alia*, that GAC:

> "32. Identify all agreements and all past, pending or contemplated negotiations of the partnership or the partners, directly or indirectly pertaining to the processing of uranium-bearing ores into U_3O_8 the conversion thereof into UF_6 or any other form, and the marketing and sale of all such uranium-bearing products.
>
> "34. Identify all studies, evaluations, projections and other data pertaining to uranium ore reserves, the mining and milling thereof, the further processing and conversion of uranium and the marketing and sale of all such uranium products."

Such information was relevant and material to the repeated allegations in UNC's Complaint that the 1973 Uranium Supply Agreement and 1974 Uranium Concentrates Agreement were executed in violation of § 49-1-1 and 49-1-2 NMSA 1953 of the New Mexico antitrust statutes.

As to UNC's First Set of Interrogatories, GAC requested and received an extension of time in which to respond.

(3) GAC neither answered nor objected to the Interrogatories within the time allowed, and UNC filed its First Application for Default Judgment on March 10, 1976. On March 12, 1976, the parties entered into an Agreement signed by counsel for UNC, GAC and Gulf Oil Corporation in which UNC agreed to withdraw its Application for Default Judgment, and GAC agreed to "answer in good faith all interrogatories to Defendant presently pending in this action," and to produce documents. No objection was made to the fact that information concerning Gulf Oil Corporation was requested, or that Gulf Oil Corporation was obligated by the terms of this Agreement to produce relevant documents. The agreement between the parties expressly referred to "Gulf Correspondence" as one category of documents which GAC agreed to provide. Said Agreement was entered into with Gulf Oil's knowledge and approval, its attorney having executed same.

(4) The documents generated by the cartel's Secretariat, telexes by the Secretariat, documents of the Canadian producers' group, as well as internal Gulf documents concerning the cartel were, at the time of the March 12, 1976 Agreement, subject to UNC's Interrogatories and the Agreement to produce. At that time, most or all of these documents were in the files and custody of Gulf Minerals Canada, Limited, a wholly owned subsidiary of Gulf Oil Corporation, and included within the scope of UNC's First Interrogatories, in Canada, and no law of the United States or Canada prohibited their production.

(5) Rather than answering the Interrogatories fully, or producing the Gulf cartel documents which was within

the ambit and requirement to furnish of its March 12, 1976 Agreement, GAC instead filed on April 2, 1976 wholly inadequate and evasive answers to the Interrogatories. In response to UNC's interrogatory No. 69 (first set) which asked GAC when the business records of Gulf and Scallop would be produced for inspection and copying, GAC, under oath answered that it would produce those records for inspection and copying on June 20, 1976.

(6) In response to GAC's Motion to Stay Further Proceedings, this Court held on April 30, 1976, that the "parties are bound by their agreements," and that GAC was obligated to provide full discovery as contemplated by the March 12, 1976 Agreement.

(7) From March 12, 1976, forward, GAC neither identified nor produced cartel documents or information in the possession of Gulf Oil Corporation and its subsidiaries, despite its Agreement to do so, and the Order of the Court on April 30, 1976, that it comply with that Agreement.

(8) On August 6, 1976, UNC filed its Second Motion for Default Judgment for GAC's failure to answer UNC's Interrogatories propounded on December 31, 1975, and its failure to abide by the March 12, 1976 Agreement and the Court's April 30, 1976 Order. In response to that Motion, GAC represented to the Court that "complete and full effort has been made to cooperate with the demands of Plaintiffs in document discovery and such attempts have gone fully beyond any good faith requirements by the Rules of Civil Procedure or agreement of the parties."

(9) From December 31, 1975, the date UNC's Interrogatories were filed in this case, through September 23, 1976, the date the Canadian government passed the Uranium Security Regulations, GAC never informed

this Court or UNC about the existence of the international uranium cartel; Gulf Oil Corporation's participation therein; or about the Gulf documents relating thereto in Canada.

(10) Despite its agreement and this Court's Order to produce Gulf documents, GAC willfully, intentionally and in bad faith covered up the fact of Gulf Oil Corporation's participation in an international uranium cartel from at least 1972 into 1975, which include years in which it was in a joint venture with UNC, viz., Gulf United Fuels Corporation (GUNF). GAC thereby deliberately concealed the existence of evidence which it knew to be highly relevant to the antitrust issues pleaded in UNC's Complaint and stressed by counsel throughout the discovery period. This intentional and willful action was a violation of UNC's discovery rights and the Orders of this Court.

(11) The Court repeatedly has warned that all parties are obligated to make full disclosure in good faith to discovery requests. On several occasions since the beginning of litigation, the Court has told all parties that it expected a good faith, non-evasive and full compliance with discovery. The Court also warned on November 30, 1976, and again on March 3, 1977, that it would apply sanctions provided under Rule 37 of the New Mexico Rules of Civil Procedure for *any party's failure to make discovery in good faith.*

(12) UNC's Second Set of Interrogatories, the discovery subject matter of which also was clearly within the ambit and requirement of its First Set of Interrogatories filed on December 31, 1975, were served on August 16, 1977. A good faith, non-evasive response by GAC to said First Set of Interrogatories would have, in whole or in part, eliminated the necessity for the Second Set of Interrogatories. The Second Set of Interrogatories requested full disclosure and commitment to a set of specific facts by GAC concerning its and Gulf's cartel

activities, and requested identification of all documents relevant to each interrogatory.

(13) UNC also filed a Motion to Produce all documents identified in GAC's Answers to Interrogatories on August 16, 1977.

(14) GAC objected to UNC's Second Interrogatories on August 23, 1977, most of which objections were overruled. On September 9, 1977, this Court held a hearing on additional objections by GAC to UNC's Second Set of Interrogatories, most of which were also overruled. GAC was ordered to answer by September 20, 1977. In a hearing before the Court on September 20, 1977, counsel for GAC requested an extension of time in which to answer said Interrogatoreis on the ground that the extension would enable counsel to provide "full and good faith" answers to the Interrogatories. The extension was granted, and on September 26, 1977, GAC filed its first Answers to UNC's Second Set of Interrogatories.

(15) GAC's first Answers consisted in a large measure of a "do-it-yourself" kit, merely directing UNC to deposition pages from which it was supposed to discover the answers to its interrogatories. This Court, on October 11, 1977, held that GAC's Answers were "defective, incomplete, inadequate and unacceptable." GAC was again ordered to answer the Interrogatories, and to give full and good faith discovery.

(16) On October 20, 1977, GAC filed its Second Answers to UNC's Interrogatories. Those "Answers" excluded all information contained in the Gulf documents in Canada, and did not identify the documents as GAC had been ordered to do on October 11, 1977.

(17) On December 9, 1977, Indiana and Michigan, Detroit Edison and UNC joined in moving to compel further answers to UNC's Second Set of Interrogatories.

(18) After consideration of all briefs filed by GAC and others, this Court held that the answers made and filed by GAC to date had not complied with the Court's orders to make complete, good faith, and non-evasive answers to UNC's Second Set of Interrogatories. The Court therefore again ordered GAC "completely, in good faith, and without evasion" to answer each of the interrogatories enumerated in Finding No. 3 of the Court's December 27, 1977, Order. The Court also specifically gave notice in its December 27, 1977, Order that if GAC failed or refused to comply with that Order of the Court, any aggrieved party could apply to the Court for appropriate relief under Rule 37.

(19) GAC obtained from the Court two extensions of time in which to answer UNC's Interrogatories, and filed its Second Supplemental Answers on February 1, 1978. The Court has examined the answers so filed and finds them unresponsive and evasive to the questions asked, and mere legal argument in many of such answers. The series of Interrogatory Answers filed by GAC, after six months shows disdain for this Court's Orders that all parties make good faith discovery. Those answers so filed, coupled with what had gone before them, constitute, in effect, obstruction of justice, and demonstrate a willful deliberate and flagrant scheme of delay, resistance, obfuscation and evasion in discovery matters.

(20) The latest answers filed by GAC also violate the express terms of the Court's Order of October 11, 1977, wherein the Court held that the deposing party is entitled to obtain from the deponent party a commitment to a set of facts, posture or position on the subject matter of the Interrogatory. Rather than committing to a set of facts, GAC instead simply has stated that various cartel documents cited by I & M, which GAC had failed to mention in its Second Answers, "purport to" reflect certain events. GAC steadfastly has refused and refuses

to admit that such events took place, or to state the true facts concerning the cartel, and Gulf's participation in it.

(21) By reason of the entire history relating to the manner of fulfilling its discovery requirements since the filing of UNC's First Set of Interrogatories on December 31, 1975, the Court concludes that it is hopeless to expect that GAC will in "good faith and without evasion" comply with the discovery requirements of the New Mexico Rules of Civil Procedure or this Court's Orders. GAC has willfully, intentionally, deliberately and in bad faith, failed and refused to answer UNC's Second Set of Interrogatories. UNC and the other parties to this suit have been irreparably prejudiced by this failure. Any party to any civil action is entitled to have and rely upon good faith discovery in the preparation and presentation of its case in chief and not at the end of the trial on its merits when such discovery is of little or no value to such party. If there can be any sanctions for non-discovery and if Rule 37 has any meaning, a party unlawfully deprived of discovery is entitled to those sanctions early and as a part of its case in chief and not at the end of the trial on its merits, whereby the innocent victim party would suffer the jeopardy of a motion for dismissal under Rule 41 (or for a directed verdict) without having the discovery to or sanctions to counter such a motion. It is now too late to expect answers or discovery in time to serve the purposes of the discovery rules and the Rules of Civil Procedure. This Court, in the interests of justice and fairness to all parties, and in order to enforce equality within the judicial process, must, at this time, apply appropriate sanctions for non-discovery specifically provided for in Rule 37 of the New Mexico Rules of Civil Procedure.

(22) GAC is under a duty to produce all documents to UNC which are or may be relevant to any of the

Interrogatories asked in UNC's First Set of Interrogatories and even more particularly delineated and asked in UNC's Second Set of Interrogatories, including but not limited to any documents relevant under questions 30 through 34 of the First Set of Interrogatories.

(23) GAC has represented to the Court and to all parties on several occasions that UNC had all documents which were relevant to the cartel or other issues raised in UNC's Interrogatories.

(23-A) GAC, as well as all parties to this action has been under a continuing obligation to update answers to interrogatories and to continue to produce documents in this litigation as their existence became known. In early January, 1978, GAC produced additional cartel documents to the U.S. Grand Jury in Washington, D.C. and to Westinghouse Electric Corporation. GAC, in bad faith, failed to reveal the existence of these documents to this Court or to the parties to this case, until after UNC had learned of their existence from a third party and made a demand upon GAC.

(24) The facts hereinabove set forth display a pattern and practice of GAC and Gulf to conceal documentary evidence of Gulf's and GAC's anti-trust activities and to subvert the discovery processes of this Court. GAC has deliberately failed to produce highly relevant documentary evidence. GAC has deliberately failed to inform this Court and the other parties, in a reasonably timely manner, of actions taken by another court in another jurisdiction which had a direct bearing upon the existence and materiality of such evidence. On August 10, 1977, Judge Snyder entered an order de-privileging, making public and holding outside the scope of the attorney-client privilege, approximately 41 of the 84 documents turned over to him by Gulf Oil Corporation for inspection in the Federal District Court in Pittsburgh, Pennsylvania. De-

spite the fact that the same law firm which represents GAC in this action represented Gulf before Judge Snyder in the Federal case in Pittsburgh, this matter inexplicably was not brought to this Court's attention promptly by GAC. GAC never accurately disclosed to the Court nor to UNC the existence of all 84 of the documents turned over by Gulf to Judge Snyder in the Westinghouse litigation. The existence of most of those documents was not disclosed to the Court or to UNC until over one year after they were called for by UNC's First Set of Interrogatories and the agreement of the parties on March 12, 1976. The existence of some of the Snyder documents was not disclosed by the Court or to UNC until after Judge Snyder held them to be public and outside the scope of the attorney-client privilege. It was not until after UNC brought the matter of the Snyder order up in open court on October 7, 1977 and this Court's subsequent order that GAC first identified and turned over to UNC some of the Snyder documents. The failure to reveal the existence and identity of all of the Snyder documents in a timely manner in this case, was a deliberate attempt to further conceal the existence and identity of that evidence and avoid turning relevant documents over to parties to this litigation in compliance with lawful discovery demands.

Based on all facts, the Court is forced to conclude, therefore, that GAC has followed a consistent pattern and practice of concealing, rather than revealing, highly relevant documents to the Court and to the parties here, and that such actions and practices have been contumacious, intentional, willful, deliberate and, in the utmost bad faith.

(25) Within the ambit and requirement of its First Set of Interrogatories, filed on December 31, 1975, UNC's Second Set of Interrogatories with even more particularity and specificity ask, in almost every question, for the separate identification of documents relating to the

subject matter of each separate interrogatory, and production of all documents so identified. In GAC's First Answers to such Second Set of Interrogatories, filed on September 26, 1977, no identification of documents was made and virtually no documents were produced, despite UNC's clear request for such identification and production.

(26) In its October 11, 1977, Order, the Court required and ordered GAC to "separately, clearly and definitively identify all documents, where such identification is requested, whether such documents be housed only in Canada, only in the United States, in both countries or elsewhere."

(27) Rather than identifying the documents, GAC instead wrote a Canadian Minister asking if it could get permission to reveal "a summary of contents" of the documents. As this Court held on November 18, 1977, the Court's October 11, 1977, Order did not specify that a "summary of contents" be stated as part of the identification of documents. The Court's Order of October 11, 1977, to identify documents was not performed or complied with, but, rather, it was sought to be avoided, and willfully and deliberately violated by GAC.

(28) GAC next wrote a letter to a Canadian Minister who has been determined by the courts of Canada to have no authority to interpret or deal with the Uranium Security Regulations. Nevertheless, in full knowledge that the Minister to whom it wrote had no legal authority to interpret the Regulations, GAC asked and waited for his interpretation as to whether he thought it could identify documents in accordance with the Court's October 11 and November 18, 1977, Orders. A letter was received from the Canadian Minister saying he had no authority to interpret the Regulations, but that in his personal opinion, the Regulations did not allow identification.

(29) The Canadian Security Regulations on their face prohibit only revealing "contents or information contained in" cartel documents in Canada. A reasonable interpretation of that language, and this court so reads it, would mean that simple identification, giving the date of the document, the author, addresses, and general subject matter, would not violate the law of Canada because the "contents or information" contained in the document itself would not be revealed.

(30) Nevertheless, GAC has refused to comply with the Order of this Court also concerning identification of the Canadian documents. As of this date, GAC has not identified the documents in Canada for the benefit of the Court and the parties nor has it even stated or disclosed the number of documents housed in Canada, thereby following its established practice of concealing, rather than revealing, pertinent information.

(31) The Court's October 11, 1977, Order also required GAC to "take affirmative action and to exert all lawful effort reasonable and possible to bring about the production" of documents housed in Canada. In order to be held to have been acting in good faith, the Court said that GAC should "seek diligently dispensation from those Canadian laws so that it could lawfully produce documents to which such laws may pertain."

(32) GAC's response to this requirement that it take "all lawful effort reasonable and possible" (other than so late as February 22, 1978, to offer to take other counsel and the Court to Canada to talk to Canadian officials about production of documents, in person), was to write a simple letter to the Canadian Minister of Energy, Mines and Resources, asking if he would consent to release the documents in question. The Canadian government's answer was "no.".

(33) Actions taken by parties in similar cases in dealing with foreign governments which have imposed

secrecy laws are instructive as to the standard of "good faith" to be used in dealing with foreign governments to secure the release of documents. In *In Re Ampicillin Litigation*, in which Judge Sirica ordered that findings of fact be made against a party which refused to produce documents and because of a British secrecy law, the Defendant undertook diligent and long-term negotiations with the British government which ultimately resulted in the documents being released in their entirety.

(34) Similarly, in *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958), "good faith" in dealing with a foreign government over the release of documents was found only after the petitioner had negotiated for two years with the Swiss government, which resulted in the release of over 190,000 documents. In addition, petitioner there persuaded the Swiss government to allow a neutral third party agreed upon by petitioner and the Swiss government to inspect the documents and obtain the release of some of them.

(35) GAC's writing a simple letter to a Canadian Minister who has been declared by law to have no authority to interpret Canadian Security Regulations or to grant a dispensation therefrom does not constitute a "good faith" effort to secure the release of documents in Canada or the information contained in them. Neither GAC, nor Gulf Minerals Canada, Ltd., nor Gulf Oil Corporation has entered into any negotiations with the Canadian government, or taken any further action beyond writing a simple letter insofar as made known to this Court. Such action does not constitute the "good faith" and "diligent" effort to secure the release of the documents required by the Court's October 11, 1977, Order. In fact, GAC's actions demonstrate its actual intent to conceal the documentary evidence concerning the cartel rather than to produce it in good faith to the parties to this litigation and the Court.

(36) UNC filed a Motion on November 4, 1977, asking that this Court find all facts provable from the documents stored in Canada against GAC. The Court authorized the presentation of evidence at an evidentiary hearing.

(37) At the aforesaid evidentiary hearing, GAC put on evidence through an attorney with Howrey and Simon, who testified about the efforts made by the law firm to identify documents in answer to UNC's Interrogatories. GAC put on absolutely no evidence about how the documents came to be stored in Canada, or why they were there.

(38) UNC moved the admission at the evidentiary hearing of four separate statements by M. L. T. Gregg in his *Westinghouse (Richmond)* deposition. The admissibility of this deposition testimony was stipulated to by counsel for GAC on the record.

(39) Mr. Gregg's deposition testimony established that Gulf followed a deliberate policy of housing the cartel documents in Canada, rather than in the United States. His testimony also established that to the extent documents were in the United States, it was understood that they were to be stored in the offices of the Pittsburg law department, where they could be shielded by a claim of attorney-client privilege.

(40) It was on this uncontradicted factual record that the Court made its findings on November 18, 1977, that Gulf followed a conscious and deliberate policy of housing the cartel documents in Canada. That finding is reiterated here. Gulf's action in regard to storing cartel documents in Canada amounts to deliberately courting or seeking legal impediments to the production of the records.

(41) UNC has complied with GAC's discovery requests fully and in good faith insofar as anything in that

regard has been brought to the attention of or is known to the Court. No representation to the contrary has been made by any party hereto.

(42) All other parties to this litigation except GAC have also made good faith efforts at discovery, and have both produced documents and answered interrogatories in good faith.

(43) Based on the deposition testimony given by L. T. Gregg in this case, it is apparent that there are documents which presently exist in the files of Gulf Minerals Canada, Ltd. (a wholly owned subsidiary of Gulf) which are highly relevant to the antitrust, fraud and breach of fiduciary duty allegations by UNC in its Complaint and in its defense to GAC's Counterclaim. GAC has produced to the parties to this litigation only a small part of those documents. GAC's refusal to produce documents housed in Canada since December 31, 1975, was not based on inability to comply with production requests, but rather on bad faith refusal to produce.

(44) The cartel documents and records were clearly within the ambit and requirement of a good faith compliance with the initial discovery demands made herein by UNC in its First Set of Interrogatories on December 31, 1975, and numerous subsequent demands made prior to September 23, 1976, the effective date of the Canadian Uranium Information Security Regulations.

(45) Defendant, GAC, was in default and violation of its obligation to produce cartel documents from Canada and elsewhere in this case, prior to and long before September 23, 1976, wherein and whereby a good faith compliance with lawful discovery demands, their agreements and the Orders of this Court, would have produced in this case all of such cartel documents before there was a Canadian law or prohibition against so doing.

(46) The findings and recitals in the Court's Order of November 18, 1977, relating to discovery are adopted and incorporated herein by reference as a part of the "Recitals" of this Order. A copy of said Order of November 18, 1977, is hereunto attached.

(47) In this situation, GAC's failure to produce in good faith and failure to answer interrogatories in good faith has deprived UNC of a full and fair opportunity to cross-examine GAC's witnesses to defend against GAC's counterclaims for specific performance and damages; to rebut GAC's defenses to their claims; or on its case in chief to properly present United Nuclear's antitrust claims pleaded in the Complaint. Similarly, GAC's failure in discovery has deprived this Court of evidence which is indispensable to a proper and just adjudication of the issues in this case.

(48) The Court concludes that the only just and proper way to protect and secure due proces rights to a fair trial for UNC, and the defendant, I & M is to impose sanctions under Rule 37 of the New Mexico Rules of Civil Procedure.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

A. The Court hereby adopts and imposes the following Rule 37 sanctions against the defendant, GAC, and in favor of the other parties to this case, adopted and found as fact because of the failure of defendant, GAC to comply with discovery Rules and the Orders of this Court, which failure the Court finds to be willful and deliberate, to-wit:

1. Gulf Oil Corporation (Gulf), Gulf General Atomic (GGA), Gulf Minerals Canada, Ltd. (GMCL), General Atomic Company (GAC), and Gulf Minerals Resources Company (GMRC), severally and as co-conspirators with

each other, and with other members and participants therein, participated in the formation and operation of an international conspiracy and cartel of uranium producers ("the cartel"), from at least 1972 to 1975. The purpose and effect of the cartel was to limit the supply, control production, allocate markets and fix the price of uranium.

2. The Canadian Government encouraged, but in no way required or mandated the membership of GMCL in the cartel. Neither Gulf, GGA, GMCL, GAC, nor GMRC, nor any of them, was ever compelled by the Canadian Government to participate in the cartel. GMCL would not have had the authority to join and participate in the cartel without authorization from responsible officers of Gulf, who were members of the so called "Executive", and who gave such authorization and sanction to the participation, actions and dealings of GMCL in the cartel.

3. GMCL is and was a wholly owned subsidiary of Gulf, and after GMCL joined the cartel, its members and members of the cartel Operating Committee had a number of meetings at various locales around the globe. At such meetings, the members of the cartel, including GMCL, agreed: (a) not to sell to middlemen, wherever located, or, alternatively, to do so only on highly discriminatory terms. Such middlemen included and were understood by both GMCL and Gulf to include both Westinghouse and Gulf United Nuclear Fuels Corporation (GUNF), and (b) to divide world markets (including the USA) and to fix the price of uranium. GUNF at all times was a corporation wholly owned by Gulf and UNC as a joint venture between them, and with Gulf holding majority ownership and management control thereof.

UNC and Gulf were under a fiduciary relationship, one to the other in their aforesaid joint venture creation,

ownership and operation of GUNF. As fiduciaries, such owed to the other full disclosure of any information affecting or that might affect the operation and success of GUNF.

4. Said cartel agreements were carried out effectively; the world market price of uranium was fixed at artificially high levels by the cartel, and GUNF, a middleman, was greatly handicapped and damaged in its efforts to procure uranium.

5. Pursuant to an agreement with the cartel, Gulf, individually and with and through its divisions, affiliates and subsidiaries, including but not limited to GMCL, restricted and withheld production of uranium at Mount Taylor in New Mexico in order to limit the supply and control production of uranium in New Mexico, with the independent specific intent to monopolize New Mexico uranium reserves. The restriction of Mount Taylor production was and is a part and parcel of the aforesaid conspiracy by Gulf and by the cartel. Such restriction of production was a combination and attempt to monopolize as well as actual monopolization of New Mexico uranium reserves, and has constituted and constitutes a substantial adverse effect on New Mexico commerce.

6. Gulf and GAC executed the 1973 Uranium Supply Agreement and the 1974 Uranium Concentrates Agreement with United Nuclear Corporation (UNC) with the intent and as a part of an attempt, combination and conspiracy, engaged in by Gulf, GAC, their affiliates, divisions and subsidiaries, to monopolize New Mexico uranium reserves, and with the purpose and effect, in furtherance of the cartel conspiracy, to limit supply and control production and competition with the cartel from a New Mexico uranium producer. Both of the aforesaid contracts had and have as their object by Gulf and GAC, and do in fact operate, to restrict trade or commerce of a product of the mines of New Mexico,

and have constituted a substantial adverse effect on New Mexico commerce.

7. Gulf and GAC executed the aforesaid agreements as a part of the attempt, combination and conspiracy engaged in by them, their affiliates and subsidiaries and the cartel to monopolize and the actual monopolization of New Mexico uranium reserves.

8. Gulf and GAC knew and intended that the cartel and its actions would and did in fact substantially raise the price of uranium in the United States of America domestic market, which did substantially and adversely affect New Mexico commerce.

9. Pursuant to a policy of secrecy and the cartel's directions, rules or requirements concerning secrecy, neither did Gulf, nor GAC, nor anyone acting for them, ever inform UNC or GUNF about their aforesaid participation in or the actions of the cartel, at anytime before the execution of or negotiations concerning the aforesaid 1973 and 1974 agreements. Gulf and GAC thereby breached any fiduciary duty it may have owed in the premises to UNC or to GUNF, or to both.

10. Pursuant to the cartel's express inclusion of the United States market and United States buyers in its price fixing scheme, Gulf, GMCL and GGA quoted uranium to United States utilities at cartel prices, and to GUNF at prices above cartel prices, with specific and predatory intent of injuring GUNF and UNC, thereby breaching any fiduciary duty in the premises owed to UNC and committing a predatory act against GUNF.

11. Motivated by inside knowledge of the cartel's existence, policies and actions and its plan to keep UNC's uranium locked up and out of competition with the cartel, Gulf refused to supply uranium to GUNF as it had led UNC and GUNF to believe it would do and refused

to allow GUNF to purchase uranium on the open market, thereby breaching any fiduciary duty it may have owed to UNC.

12. The cartel viewed middlemen as serious competitors, and discriminated in price against them in order to eliminate them as competitors. Gulf Oil Corporation and General Atomic Company executed the 1973 and 1974 Uranium Supply Agreements with the purpose and effect of eliminating middlemen as competitors by keeping material off the market which they might purchase.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED:

A. Judgment by default, except upon the issues of damages, be and it hereby is entered and granted:

1. Unto United Nuclear Corporation upon its Complaint against General Atomic Company, and

2. Unto Indiana & Michigan Electric Company upon its Crossclaim against General Atomic Company.

B. The defenses of General Atomic Company to the Complaint of United Nuclear Corporation and to the Crossclaim of Indiana & Michigan Electric Company and its Counterclaim against United Nuclear Corporation and its Crossclaim against Indiana & Michigan Electric Company, be and they all hereby are stricken.

IT IS FURTHER ORDERED that the trial of this case on its merits continue and proceed upon determination of damages only, and such other matters as may now be appropriate in view of the granting of default judgments herein.

IT IS FURTHER ORDERED that the Court shall and hereby does reserve the prerogative to make and enter herein such other, further, additional or different findings, orders or judgments, and to do such acts and

conduct such proceedings as may be necessary to give full effect to the foregoing Sanctions Order and Default Judgments and to enforce justice between the parties hereto.

/s/ Edwin L. Felter
District Judge

[Entered March 27, 1978]

APPENDIX D

IN THE DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION, a Delaware corporation,
Plaintiff,

vs.

GENERAL ATOMIC COMPANY, *et al.*,
Defendants.

DECLARATORY JUDGMENT AS TO ISSUES BETWEEN UNITED NUCLEAR CORPORATION AND GENERAL ATOMIC COMPANY

This matter having come before the Court for the entry of its final declaratory judgment pursuant to the provisions of the Declaratory Judgment Act.

And it appearing to the Court that on March 2, 1978 the Court made and entered a Sanctions Order and Default Judgment by which, for the reasons therein stated, separate and independent sanctions consisting of Findings of Fact, a Default Judgment and the striking of its Answer and Counterclaim were imposed upon General Atomic Company and in favor of United Nuclear Corporation pursuant to Rule 37 of the New Mexico Rules of Civil Procedure. Said Sanctions Order and Default Judgment thereafter was modified in certain respects and as so modified should be, and hereby is approved and confirmed, and the case is ripe for the entry of judgment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AND IT IS THE DECLARATORY JUDGMENT OF THE COURT THAT:

A. The 1973 Uranium Supply Agreement executed on September 12, 1973, as of June 30, 1973 between United Nuclear Corporation, Gulf Oil Corporation and Gulf United Nuclear Fuels Corporation is null, void, unenforceable and of no effect whatever and performance thereunder is excused.

B. The Uranium Concentrates Agreement between United Nuclear Corporation and General Atomic Company dated June 28, 1974 is null, void, unenforceable and of no effect whatever and performance thereunder is excused.

C. General Atomic Company is obligated to indemnify and save United Nuclear Corporation harmless from any and all claims, causes of action, liabilities, obligations, damages, costs and expenses arising out of, or in any way connected with or relating to the latter's failure to deliver or perform under the aforesaid 1973 Uranium Supply Agreement or any other contract with an electric utility company covered by or related to said agreement.

D. General Atomic Company's defenses to United Nuclear Corporation's First Amended Complaint, as set forth in its Answer and in the Pre-trial Order, should be, and they hereby are, stricken and held for naught.

E. General Atomic Company's Counterclaim against United Nuclear Corporation and each and every count thereof, as stated in said Counterclaim and in the Pretrial Order should be, and is hereby, stricken and held for naught.

F. United Nuclear Corporation has no obligation to General Atomic Company or its predecessors in interest in respect to the sale or delivery of uranium in any form.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court having decided to make for-

mal disposition of the remaining damage issues at a later time, nevertheless determines as contemplated by Rule 54(b)(1) of the New Mexico Rules of Civil Procedure that there is no just reason for delay in the entry of this final judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff, United Nuclear Corporation, recover its costs herein to be taxed by the Clerk in the manner prescribed by law.

/s/ Edwin L. Felter
District Judge

[Entered April 4, 1978]

APPENDIX E

IN THE DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION,
Plaintiff,

vs.

GENERAL ATOMIC COMPANY, *et al.*,
Defendants.

SECOND AMENDED FINAL JUDGMENT

The above-entitled and numbered case came on for trial on October 31, 1977 before the Court sitting without a jury. On March 27, 1978, the Court disposed of various issues and controversies between United Nuclear Corporation (UNC) and General Atomic Company (GAC) and between Indiana & Michigan Electric Company (I & M) and General Atomic Company (GAC) by its Amended Sanctions Order and Default Judgment and on April 4, 1978 by its Declaratory Judgment in favor of UNC. As to the remaining issues and controversies between the various parties, the case has been fully tried and the Court has considered the evidence, has heard and read arguments of counsel and has filed herein its Decision, including Findings of Fact and Conclusions of Law as to those remaining issues and controversies, and is fully advised in the premises.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. That plaintiff, United Nuclear Corporation, do have and recover judgment of and from the defendant, General

Atomic Company, damages in the sum of $236,425.00, together with interest thereon at the rate of 6% per annum from the date of entry of this judgment.

2. That General Atomic Company, as a condition of receiving setoffs for the $6,000,000, plus interest, prepayment to United Nuclear Corporation in connection with the execution of the 1974 Uranium Concentrates Agreement and the Detroit deferral payment, plus interest, shall not exercise or attempt to exercise any rights it may have in an irrevocable letter of credit issued by The Chase Manhattan Bank, N.A. to General Atomic Company on behalf of United Nuclear Corporation.

3. That the contract dated as of August 18, 1967 between I & M and UNC (I & M contract) provides that I & M will receive the necessary enrichment services at a cost to it not in excess of $30/KgU unit.

4. That pursuant to the I & M contract GAC is presently obligated to supply the reloads for batches 6 through 9 inclusive at a designed enrichment of 2.90 w/o, unless future technological developments should make a different designed enrichment correct within the terms of the contract.

5. Under the I & M contract, GAC is not entitled to charge extra for fuel densification, fuel rod pressurization, Exxon's quality assurance program, Exxon's accident analysis program or any costs incurred by Exxon in order to enable it to meet the requirements of OSHA.

6. That I & M have and recover of and from GAC the sum of $15,950,752 as compensatory damages, which sum includes interest at 6% per annum up to April 19, 1978. The sum of $15,179,000, the principal amount of said compensatory damages shall bear interest at 6% per annum from April 19, 1978 until paid.

7. GAC is ordered to specifically perform its obligations under the I & M contract with respect to reload batches 6 through 9 inclusive in a manner consistent with the rights of the parties as declared in paragraphs 3, 4 and 5 hereof.

8. GAC is hereby ordered and directed to deliver one million seven hundred thousand (1,700,000) pounds of U_3O_8 to I & M on a schedule which will enable I & M to meet the requirements of the Cook plant without the payment of late charges on the terms and conditions, including price, set forth in the I & M contract. In computing the price to be paid pursuant to this paragraph, escalation shall be calculated as though delivery had been made on the last day of the quarter in which it was due.

That UNC and I & M have and recover their costs and disbursements in this action to be taxed by the Clerk.

This Second Amended Final Judgment supercedes the Final Judgment entered herein on May 16, 1978, and the Amended Final Judgment entered herein on May 17, 1978.

/s/ Edwin L. Felter
District Judge

[Entered May 17, 1978]

APPENDIX F

IN THE DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION,
Plaintiff,

vs.

GENERAL ATOMIC COMPANY, *et al.*,
Defendants.

DECISION OF THE COURT

The Court hereby makes the following Decision herein:

FINDINGS OF FACT

1. United Nuclear Corporation (UNC), plaintiff herein, is a corporation duly organized and existing under the laws of the State of Delaware, duly qualified to do business in the State of New Mexico.

2. Defendant General Atomic Company (GAC) is a general partnership, the general partners of which are Gulf Oil Corporation (Gulf) (a Pennsylvania corporation) and Scallop Nuclear, Inc. (Scallop) (a Delaware corporation) and has transacted business in New Mexico out of which this cause of action arises.

3. This action was commenced on December 31, 1975 by the filing of plaintiff's complaint and by the service of summons and complaint on the Corporation Company, registered agent for Gulf, a general partner in GAC, in the State of New Mexico.

4. On September 12, 1973, effective June 30, 1973, UNC, Gulf United Nuclear Fuels Corporation (GUNF)

and Gulf executed an agreement which purportedly required UNC to deliver approximately 27,000,000 pounds of U_3O_8 (the 1973 Uranium Supply Agreement). GAC has assumed the rights and obligations of Gulf and GUNF in this agreement.

5. In June, 1974, UNC and GAC entered into a purported agreement for the supply of 3,000,000 pounds of U_3O_8 (the 1974 Uranium Concentrates Agreement). In connection with the execution of such instrument, UNC received $6,000,000 from GAC, which is secured by an irrevocable letter of credit issued by The Chase Manhattan Bank, N.A.

6. This case came on for trial on October 31, 1977, which trial continued, with recesses, from time to time, to May 1, 1978.

7. On March 2, 1978, this Court entered its Sanctions Order and Default Judgment finding that judgment should be entered in favor of UNC and Indiana & Michigan Electric Company (I & M), because of GAC's failure to comply with its discovery obligations. On March 27, 1978, this Court entered its Amended Sanctions Order and Default Judgment.

8. On April 4, 1978, this Court entered its Declaratory Judgment as to Issues between United Nuclear Corporation and General Atomic Company, which adjudicates the rights and obligations of UNC and GAC relevant to this action, other than the issue of damages.

9. The effect of the Amended Sanctions Order and Default Judgment insofar as they pertained to UNC and the Declaratory Judgment was to declare that the 1973 Uranium Supply Agreement and the 1974 Uranium Concentrates Agreement were void and voidable at their inception, all as more fully shown and determined by the findings of fact and recitals contained in the Amended Sanctions Order and Default Judgment and as further shown by the Court's Declaratory Judgment.

10. GAC's and its predecessors' wrongful and tortious activities which were adopted by GAC and for which GAC is liable, resulted in UNC being required to make deliveries under the void and voidable 1973 Uranium Supply Agreement and were the proximate cause of damage to UNC as is more specifically set forth herein.

11. Damage was caused to UNC when uranium covered by the 1973 Uranium Supply Agreement was transferred from its possession to GAC's or its predecessor's possession or that of GAC's customer.

12. Included in the total damages suffered by UNC was damage in the amount of $753,108.00, including interest, caused to UNC when UNC transferred some 78,310 pounds of U_3O_8 to Duke at GAC's order in March of 1975.

13. The market price for U_3O_8 at the time of the transfer of possession from UNC to GAC or to GAC's customer and at the time the uranium was wrongfully taken is reflected by the Nuclear Exchange Company (NUEXCO) exchange value for the month the uranium was transferred.

14. UNC has been damaged and should recover as damages the gross amount of $8,264,723, being the difference between the contract price paid and the market price for U_3O_8 existing at the time UNC was wrongfully required to transfer possession of the U_3O_8.

15. GAC is entitled, as a lawful setoff to the damages awarded UNC, to an amount equal to the $6,000,000 prepayment for the 1974 Supply Agreement and the deferral payments received from Detroit Edison Company, plus interest. This setoff totals $8,028,298. GAC's setoff for these amounts compensate it for the only items which might be considered a windfall or unjust enrichment had they been retained by UNC without setoff therefor.

16. GAC is entitled to no setoff or award of damages for the delivery of 1,200,000 pounds of uranium to Detroit Edison Company in December of 1974. UNC could have claimed damages for such delivery for the difference for the contract price paid and market price in December, 1974 but it did not do so as shown by Exhibit T-3906.

17. UNC has been damaged in a net amount, after setoffs, of $236,425.

18. Plaintiff's Exhibit T-3906 correctly reflects the instances in which U_3O_8 was wrongfully taken from UNC by GAC or its predecessors; the proper market price at the date UNC's U_3O_8 was wrongfully taken; UNC's gross damages; GAC's setoffs; and UNC's net damages.

19. UNC has received no windfall by the Court's Declaratory Judgment and will reveive no windfall by the award of damages as set forth herein. To the contrary, UNC will merely be compensated for the damages caused by the wrongful taking of its property. If the Court had not entered its Declaratory Judgment, GAC would have been unjustly enriched and received a windfall in an amount up to $957,000,000. Further, if the Court did not award UNC compensatory damages as set forth herein, GAC would receive a windfall in that amount.

20. On or about January 21, 1977 this Court granted the motion of GAC (consented to by Indiana & Michigan Electric Company (I & M) to implead I & M as a third party defendant.

21. On or about March 7, 1977 I & M duly served upon the Corporation Company, registered agent for Gulf, a summons and the amended cross-claim herein. In addition, said cross-claim was duly served on the attorneys for GAC.

22. On or about July 11, 1968 I & M entered into a contract with UNC dated August 18, 1967 (I & M contract). Said contract provided for the delivery of 3.4 million pounds of U_3O_8 to I & M and for the delivery of six reload batches of fabricated fuel to I & M.

23. The obligations of said contract were subsequently assumed by Gulf United Nuclear Fuels Corporation (GUNF) effective July 1, 1971 and then by Gulf (on or about September 12, 1973) and finally by GAC (on or about January 1, 1974). As a result of the transactions described above, GAC is the assignee of all the rights and obligations originally held by UNC under the I & M contract.

24. By the contracts creating GAC the partnership became liable for and assumed and agreed "to pay, perform and discharge all liabilities of Gulf" under the I & M contract.

25. GAC also assumed all liabilities relating to the business of the Gulf Energy and Environmental Systems Companies (GEES), including not only those of Gulf General Atomic but those of Gulf Energy and Environmental Systems Company and Gulf Environmental Systems Company.

26. At the time General Atomic Company assumed the liabilities of GEES, (including but not limited to the liabilities of Gulf General Atomic), Gulf warranted to its partner Scallop that all such liabilities had been disclosed.

27. The relevant agreement provided that such warranty should survive the closing and run in favor of Scallop as well as GAC.

28. I & M has at all times duly performed all of the obligations of the I & M contract on its part to be performed.

29. Commencing on or about June 1975 GAC has failed and refused to perform the obligations of said contract on its part to be performed.

30. This Court has heretofore decided in effect and by necessary implication in its Amended Sanctions Order and Default Judgment that said refusal was without just cause. Said finding was necessitated by the refusal of GAC and its partners to comply with the discovery orders of this Court, which refusal precluded a fair trial of the issues.

31. Of the 3.4 million pounds of U_3O_8 to be delivered to I & M as U_3O_8 pursuant to the contract, 1.7 million pounds were in fact delivered; 1.3 million pounds were to have been delivered heretofore but were not delivered and delivery of the remaining 400,000 pounds is due on or before June 30, 1978.

32. Of the six fabricated fuel reloads to be delivered by GAC pursuant to the terms of the contract two were delivered by GAC pursuant to orders of this and another Court. By the terms of said orders GAC received more than it was entitled to by virtue of the I & M contract and I & M retained its right to claim the overage as damages. Four reloads remain to be delivered.

33. GAC will not perform any of its remaining obligations under the contract unless compelled by an order of this Court.

34. With respect to those obligations as to which performance by GAC is now past due:

a) I & M's damages resulting from the failure of GAC to deliver reload batch 4 amount to $2,083,000 less the cost of burnable poisons in the sum of $259,000, or a net sum of $1,824,000, with interest thereon at 6% per annum. As of April 19, 1978 said interest amounted to $98,990.

b) I & M's damages resulting from the failure of GAC to deliver reload batch 5 amount to $13,355,000 with interest thereon at 6% per annum. As of April 19, 1978 said interest amounted to $672,762.

c) The price stipulated in the I & M contract for the 500,000 pounds of U_3O_8 to be delivered in the second quarter of 1975 was $7.50.

d) The price stipulated in the I & M contract for the 400,000 pounds of U_3O_8 to be delivered in the second quarter of 1976 was $10.05 per pound.

e) The price stipulated in the I & M contract for the 400,000 pounds of U_3O_8 to be delivered in the second quarter of 1977 can be calculated from the provisions of the I & M contract by taking judicial notice of the appropriate escalation indices as published by the United States Government. From such calculation it appears that the price for said 400,000 pounds is $10.69 per pound.

35. I & M recently purchased 500,741 pounds of U_3O_8 at $43.55 plus a commission of 15 cents per pound for a total cost to I & M of $21,882,270.55.

36. The foregoing transaction was accomplished on the open market by arms-length negotiation.

37. Although the price of $43.70 per pound paid by I & M to Anaconda represented very close to the market price for U_3O_8 at the time, that market is subject to considerable fluctuation and it does not necessarily follow that a substantial quantity of U_3O_8 could be purchased today or in the future for the same price.

38. The I & M contract also provides for a delivery of 400,000 pounds during the second quarter of 1978. It is not possible to calculate the contract price for such delivery since the escalation indices necessary for such calculation have not been published.

39. The damages to I & M resulting from GAC's failure to perform its obligations under the contract to deliver reload batches 6-9 inclusive, if specific performance is not required, cannot be presently computed because (a) it is impossible to forecast with any certainty future SWU prices; (b) it is impossible to forecast with any certainty future U_3O_8 prices; (c) it is impossible to obtain today the valuable warranty I & M is entitled to under the contract; and (d) the price which I & M is required to pay pursuant to the terms and conditions of the contract depends on escalation indices which have not been computed or published and cannot be accurately predicted.

40. The clear and unambiguous terms of the contract provide that I & M should pay for separative work at a price not in excess of $30/KgU unit.

41. Said provision was agreed to in exchange, among other things, for I & M's promise to pay $1,000,000 in advance.

42. At all times between 1967 and the outbreak of these disputes in 1974 all parties treated the contract as providing for a limit of $30/KgU unit.

43. On many occasions prior to the outbreak of these disputes in 1974 authorized officials of GAC including its chief officer admitted that the contract provided for a ceiling of $30/KgU unit.

44. At all times from 1967 to the present date those who negotiated the contract on behalf of UNC and I & M have all believed and stated that the contract provided for a ceiling of $30/KgU unit without escalation in any manner or amount.

45. Pursuant to the I & M contract, I & M was entitled to have delivered to it fabricated fuel reload batches fabricated in accordance with the specifications of Appendix A to said contract.

46. Pursuant to the terms of the I & M contract any deviation from the specifications of Appendix A were to be approved by I & M.

47. There have been numerous deviations from the specifications of Appendix A all of which except one have been submitted to I & M and approved by it.

48. The one deviation which has not been so submitted and approved is a reduction in the enrichment levels from enrichments equal to or in excess of 3.26 to a level below 2.90 (reduction to the level of 2.95 for batch 4 and 2.90 for batches 5 through 9 inclusive have been approved by I & M).

49. Reduction of enrichment level to below 2.90 would result in I & M's receiving less than the scheduled burnups provided in said Appendix A of the contract.

50. Said burnups were the essential thing for which I & M contracted. A reduction therein is a substantial change in the provisions of said Appendix A.

51. Said reduction would adversely affect the operating maneuverability of Cook 2 and its ability to contribute economically to the system of which it is a part.

52. The I & M contract provides that the enrichment level of the reload fuel supplied should be consistent with attaining and maintaniing Unit No. 1 operation at its licensed power level, and consistent with maintaining Unit No. 1 operating maneuverability.

53. The I & M contract also provides that the fuel management program shall be based upon refueling shutdown schedules established by the Seller and which are concurred in by Purchaser. Such refueling schedules are to be established on the basis of energy production and the requirements of Purchaser's system and are to be consistent with the burnups scheduled in Appendix D to the contract.

54. None of these conditions will be met if the enrichment level is reduced below 2.90 unless changes in technology not now in existence made such reduction then feasible.

55. I & M was and is accordingly justified in refusing its consent to a reduction in enrichment below 2.90 unless future changes in technology should then make such a refusal unjustifiable.

56. Pursuant to the contract GAC is obligated to change the design set forth in Appendix A to meet any changed requirements of the AEC and its successors.

57. In the event additional costs are incurred by GAC as a result of such design changes GAC is entitled to an equitable adjustment to reflect such additional costs.

58. GAC has claimed in these proceedings that four design changes were made entitling it to an equitable adjustment. These are fuel densification, fuel rod pressuration, a quality assurance program and an accident analysis program.

59. Of these only fuel densification and fuel rod pressurization are design changes within the meaning of the contract.

60. Exxon, sub-contractor of GAC, made no separate charges to GAC for either of these items.

61. Although requested by GAC, Exxon refused to attribute any particular cost to either of these items.

62. There has accordingly been a failure of proof as to what extra amounts, if any, were paid by GAC with respect to these items.

63. In fact, GAC was able to subcontract its entire fabrication obligation to Exxon including the two items mentioned in Finding 59 above at a profit to GAC of approximately $10,000,000.

64. The quality assurance program is not a design change, nor is it a requirement of an agency other than the AEC or its successors.

65. Exxon made no separate charge for the quality assurance program.

66. Although requested by GAC, Exxon has refused to attribute any particular cost to the quality assurance program.

67. There has accordingly been a failure of proof as to what exact amounts if any were paid by GAC with respect to the quality assurance program.

68. The accident analysis program is not a design change mentioned in Art. VIII(C) of the contract, nor is it a change required by an agency other than the AEC or its successors.

69. Exxon made no separate charge for the accident analysis program.

70. Although requested by GAC, Exxon has refused to attribute any particular cost to the accident analysis program.

71. There has accordingly been a failure of proof as to what exact amounts if any were paid by GAC with respect to the accident analysis program.

72. At the time it negotiated the subcontract Exxon did not have the expertise to attribute a separate cost to the fuel densification problem, the fuel rod pressurization problem, or the quality assurance program.

73. Exxon made no separate charges with respect to the meeting of OSHA standards.

74. Although requested by GAC, Exxon refused to attribute any particular cost to this item.

75. There has accordingly been a failure of proof as to what extra amount if any was paid by GAC with respect to this item.

76. Under certain conditions as a safety measure reload batches may require the use of "fixed shims" or "burnable poisons."

77. If such burnable poisons are required it is the responsibility of GAC to provide and pay for them.

78. It was the opinion of both I & M and Exxon at the time of the fabrication of reload batch 4 that reasonable conservative engineering required the use of burnable poisons.

79. Such poisons were in fact installed but GAC refused to take financial responsibility therefor on the ground that it believed such poisons were unnecessary.

80. GAC now claims that events have shown that burnable poisons were in fact not required and the evidence fails to establish that they were required.

CONCLUSIONS OF LAW

A. This Court has jurisdiction of the parties and of the subject matter of this action.

B. The proper measure of damages to be paid by GAC to UNC in this case is the difference between the contract price paid UNC and the market price for U_3O_8 at the time and place the uranium was wrongfully taken from UNC, i.e., at the time and place which UNC transferred possession of the U_3O_8 to GAC or to the utility customers.

C. GAC is liable for the acts of its predecessors in interest and for the acts of its constituent partners, Gulf Oil Corporation and Scallop Nuclear, Inc.

D. GAC has been credited with a setoff in the total amount including interest, of $8,028,298 for the $6,000,000 prepayment given in connection with the execution of the void and voidable 1974 Supply Agreement and the Detroit Edison deferral payments. As a result, GAC is not entitled to and should not draw upon or seek to exercise any rights in connection with the irrevocable letter of credit issued by The Chase Manhattan Bank, N.A. to GAC on behalf of UNC.

E. UNC has suffered as damages a gross amount of $8,264,723, which were proximately caused by the wrongful and tortious acts of GAC and its predecessors, for which GAC is liable.

F. UNC should have and recover from GAC the sum of $236,425 after all setoffs as damages by virtue of UNC being wrongfully required by GAC and its predecessors to deliver uranium under the void and voidable 1973 Supply Agreement.

G. UNC has received and will receive no windfall and its claim for damages is not barred thereby.

H. The contract with Indiana & Michigan Electric Company is a valid contract and has been performed by Indiana & Michigan since its inception.

I. General Atomic Company assumed the I & M contract, accepted its benefits and is bound by its terms. It also expressly and by implication of law, assumed the obligations flowing from the acts and omissions of General Atomic Company's predecessors.

J. On or about June 1975 General Atomic Company breached the contract.

K. Under the circumstances of this litigation, a decree of specific performance for future obligations under the contract becomes the ordinary and natural relief rather than the extraordinary form of relief.

L. Under the circumstances of this litigation, a decree of specific performance to the extent rendered contemporaneously herewith not only more fully compensates I & M for what it has suffered as a result of GAC's default but benefits GAC in that it will be able to perform only on the schedule actually required by I & M.

M. Under the circumstances of this case Indiana & Michigan Electric Company is also entitled to compensatory damages.

N. I & M is entitled under the contract to a ceiling price for separative work which shall in no event and under no circumstances exceed $30/KgU unit.

O. I & M is entitled to an enrichment in reload batch 4 of 2.95 w/o and in reload batches 5 through 9 inclusive of 2.90 w/o, unless future technology not now in existence should materially change enrichment requirements as to a future batch or batches of fuel within the terms of the contract.

P. GAC is not entitled to charge any of the amounts it has claimed herein as additional costs under the contract either on the basis that they constitute design changes or on the basis that they constitute additional requirements of an agency other than the AEC or its successors.

Q. GAC is not responsible for the cost of the burnable poisons used in batch 4.

R. Plaintiff, UNC, and Defendant I & M, should have and recover from GAC their respective costs expended in this action.

All Requested Findings of Fact and Conclusions of Law inconsistent with or not included in this the Court's Decision, are denied.

/s/ Edwin L. Felter
District Judge

[Entered May 16, 1978]

APPENDIX G

IN THE DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION,
Plaintiff,

vs.

GENERAL ATOMIC COMPANY, *et al.*,
Defendants.

ORDER

This matter coming on regularly to be heard by the Court upon the motion of Plaintiff, United Nuclear Corporation "For Order Compelling Identification and Production of Documents and Finding All Facts Provable From Canadian Documents Against Gulf and GAC", and the responses to said motion filed by Defendant, General Atomic Company; the Court having considered said motion, responses, oral and written arguments of counsel, affidavits, the record proper and evidence heretofore admitted by the Court applicable to such motion, and being otherwise fully advised in the premises, Finds and Concludes:

1. Due process of law and the equal application and protection of law require that *each* party to this case fully comply with Rules 31 through 34 inclusive of the New Mexico Rules of Civil Procedure and produce for inspection and copying *all* documents included within the scope of such rules which are relevant or may lead to relevant evidence and which are not privileged under the laws of New Mexico.

2. Deference to the sovereignty and national interest of Canada or its provinces cannot be accomplished

through sacrifice of the sovereignty of New Mexico and of due process of law and equal application and protection of law afforded by the laws of New Mexico. In this forum, the aforesaid laws of this forum which protect the fundamental public policy of this State must govern over the national interest or policy of a foreign country as legislated and conceived by that foreign country. No rule of comity would require a sovereign state of the United States to so abdicate the protection of fundamental rights under its general laws that are necessary to a fair trial in favor of special foreign laws that are not concerned with any aspect or requirement of fair trial.

3. No adequate remedy or protection in these premises exists except for the production of the documents which are the subject of the foregoing motion or the finding by this Court of all facts provable from such documents against the party failing to produce them in accordance with Rules 31 through 34, inclusive, and as authorized by Rule 37 of the New Mexico Rules of Civil Procedure. Said documents have not been produced for inspection and copying, and Defendant, General Atomic Company has failed to produce said documents, caused in part, by its own early and deliberate policy of housing such documents in Canada and outside the boundaries of the United States of America.

4. The Court's order herein dated October 11, 1977 required of Defendant, General Atomic Company that is "clearly and definitively" identify all documents housed in Canada, but said order did not specify a "summary of its contents" as a part of such identification. These provisions of the Court's order were not performed or complied with but rather they were sought to be avoided.

5. In response to the Court's order of October 11, 1977 Defendants, General Atomic Company identified certain documents not housed in Canada by reference

to computer number. Such method of identifying documents in this instance and in view of the time constraints imposed therein, may be considered by the Court to be a reasonable and substantial compliance with the Court's order as to those documents so identified, to the extent that such identification is accurate.

Now, Therefore, In Accordance With The Foregoing Findings and Conclusions, IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. Defendant, General Atomic Company, forthwith shall identify, clearly and definitively, all documents housed in Canada which are the subject of said motion.

2. All facts provable from documents housed in Canada which are not produced and which are the subject of said motion are found against Defendant, General Atomic Company, and said defendant is precluded from offering evidence herein in opposition to such findings of fact; subject however, to the other provisions of this order.

3. On or before December 15, 1977, or at least 7 days before plaintiff rests its case in chief, whichever shall first occur, Plaintiff, United Nuclear Corporation shall file and serve proposed findings of fact on the factual issues to be determined against Defendant, General Atomic Company by reason of the non-production of the foresaid "cartel" documents which are the subject of Plaintiff's motion. Within fifteen (15) days after service of such proposed findings of fact, each defendant herein may file and serve responses to such proposed findings of fact. All parties may accompany such filings with memoranda of argument and authorities, if desired.

4. In making its final decision herein and at any other appropriate stage of the proceedings herein the Court will consider and give effect to appropriate findings of fact consistent with this order and consonant with the

evidence then admitted and before the Court, which is relevant to the issue.

5. The time limits specified in this order may be extended, shortened or modified for good cause shown.

/s/ Edwin L. Felter
District Judge

[Entered November 18, 1977]

APPENDIX H

IN THE DISTRICT COURT
OF THE FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION, a Delaware corporation,
Plaintiff,

v.

GENERAL ATOMIC COMPANY, a partnership composed of GULF OIL CORPORATION and SCALLOP NUCLEAR, INC.,
Defendants.

The above entitled cause having come on before the Court on plaintiff's application for a preliminary injunction prohibiting General Atomic Company or its partners, privies, agents, servants and employees from instituting or prosecuting any action or actions in any other forum, and notice having been given as provided by law, and the Court having considered all pleadings, affidavits, documentary evidence, briefs and argument of counsel, FINDS:

1. This Court's jurisdiction over the parties and subject matter of this action attached prior to the institution of any proceedings in any other forum involving the subject matter of this action.

2. In the interest of orderly procedure, the parties to this suit should have their rights, duties and liabilities determined by this Court.

3. A determination of this lawsuit may fully resolve the disputes between the parties, thus obviating any need for further litigation concerning the subject matter of this suit.

4. Plaintiff will be irreparably injured should the injunction prayed for not be granted in that defendant has admitted that unless restrained it will seek to file additional actions against plaintiff and plaintiff will have no adequate remedy at law in that the harm sought to be avoided by this injunction will have occurred.

5. The institution or prosecution of other legal proceedings by any of the parties to this action, or their privies, would be vexatious and harassing and would be multiplicitous litigation, all of which is contrary to the speedy and orderly administration of justice.

6. The inconvenience, amount of litigation, and expense which would be suffered by the parties if other proceedings are instituted or prosecuted will be reduced or eliminated if a preliminary injunction is granted.

7. There is currently pending in the United States District Court for the District of New Mexico a case entitled Gulf Oil Corporation v. United Nuclear Corporation. Civil No. 76-032-B. There is also currently pending before the United States Court of Appeals for the Tenth Circuit an appeal entitled General Atomic Co. v. Duke Power Company, et al., No. 76-1152.

8. No bond or security need be given by United Nuclear Corporation as this injunction merely maintains the status quo between the parties and this preliminary injunction will benefit both parties in that the inconvenience and expense of multiplicitous litigation will be reduced or eliminated.

And the COURT CONCLUDES as matters of law that:

A. This Court has jurisdiction over the subject matter of this action and the parties hereto.

B. This Court has the authority to issue a preliminary injunction as requested by plaintiffs and should do so, except, however, that this injunction shall not operate so as to forbid Gulf Oil Corporation from prosecuting the case entitled Gulf Oil Corporation v. United Nuclear Corporation, Civil Cause No. 76-032-B in the United States District Court for the District of New Mexico, a cause pending at the time application for this preliminary injunction was made, and the prosecution of that appeal to the Tenth Circuit Court of Appeals entitled General Atomic Co. v. Duke Power Company, et al., No. 76-1152.

IT IS THEREFORE ORDERED that General Atomic Company, its partners, privies, agents, servants and employees, are hereby preliminarily enjoined and prohibited from filing or prosecuting any other action or actions against United Nuclear Corporation in any other forum relating to any rights, claims or the subject matter of this action. This injunction prohibits the institution or prosecution of ordinary litigation, third party proceedings, cross-claims, arbitration proceedings or any other method or manner of instituting or prosecuting actions, claims or demands relating to the subject matter of this lawsuit, or including United Nuclear Corporation as a party thereto. However, the case of Gulf Oil Corporation v. United Nuclear Corporation, Civil Cause No. 76-032-B, currently pending in the United States District Court for the District of New Mexico, is excepted from the operation of this preliminary injunction, as is the appeal currently pending before the Tenth Circuit Court of Appeals in General Atomic Co. v. Duke Power Company, et al., No. 76-1152.

The injunction herein against defendant shall bind Plaintiff to the same terms.

Submitted:

HARRY L. BIGBEE
One of Pltfs. Attys.

WILLIAM FEDERICI
One of the Defendant's
Attorneys.

EDWIN L. FELTER
District Judge

[Entered April 2, 1976]

APPENDIX I

IN THE DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION,
Plaintiff,

vs.

GENERAL ATOMIC COMPANY, *et al.*,
Defendants.

PARTIAL FINAL JUDGMENT

This matter having come on to be heard before the Court upon plaintiff United Nuclear Corporation's Application for Order Staying Arbitrations and Partial Final Judgment, the parties having appeared by their respective counsel of record and the Court now being sufficiently advised, and

The Court having thereafter made and entered its findings of fact and conclusions of law in respect to the issues raised by said Application, and

It further appearing to the Court that pursuant to the provisions of Rule 54(b)(1) in the New Mexico Rules of Civil Procedure, and the Uniform Arbitration Act, 23-3-9, *et seq.*, N.M.S.A., 1953 (1975 Supp.), there is no just reason for delay in the entry of a partial final judgment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that United Nuclear Corporation's Application for Order Staying Arbitrations and Partial Final Judgment, be and the same hereby is granted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that further arbitration proceedings predicated upon the following demands for arbitration made by Defendant General Atomic Company against Plaintiff United Nuclear Corporation in the following arbitration proceedings, viz:

A. The Demand for Arbitration filed by General Atomic Company on November 29, 1977 with the American Arbitration Association for arbitration of the disputes arising under the 1973 Supply Agreement, a copy of which is attached to GAC's Motion to Stay Proceedings,

B. *Duke Power Company* v. *GAC*, Case No. 31-10-0009-76, in Charlotte, North Carolina,

C. *Commonwealth Edison Company* v. *UNC, GAC and Gulf*, Case No. 51-10-0106-74-C in Chicago, Illinois

shall be, and each of them hereby are, stayed until the further order of the Court, Provided, however, that this Partial Final Judgment shall not, in and of itself, operate to preclude Defendant General Atomic Company from asserting claimed federal rights in appropriate judicial proceedings.

IT IS FURTHER ORDERED, DECLARED, DETERMINED AND ADJUDICATED that Defendant General Atomic Company has no right to arbitrate any issue in the aforesaid arbitration proceedings or pending herein against Plaintiff United Nuclear Corporation.

/s/ Edwin L. Felter
District Judge

[Entered December 16, 1977]

IN THE DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION, a Delaware corporation,
Plaintiff,

vs.

GENERAL ATOMIC COMPANY, a partnership composed of GULF OIL CORPORATION and SCALLOP NUCLEAR, INC., *et al.*,
Defendants.

DECISION OF THE COURT

The issue of arbitration having been submitted for summary determination pursuant to § 22-3-10, N.M.S.A. 1953, on December 6, 1977 before this Court sitting without a jury, with Bigbee, Stephenson, Carpenter & Crout appearing as counsel for plaintiff and Rodey, Dickason, Sloan, Akin & Robb; Montgomery, Andrews & Hannahs; and Howery & Simon appearing as counsel for defendant; the Court having considered the allegations and proof of the parties, argument of counsel and authorities cited, and being otherwise fully advised, finds generally in favor of plaintiff and against defendant and hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff, United Nuclear Corporation, (UNC), is a Delaware corporation, and is qualified to do business in New Mexico.

2. Defendant, General Atomic Company (GAC), is a general partnership composed of Gulf Oil Corporation (Gulf), is a Pennsylvania corporation, and Scallop Nuclear, Inc. (Scallop), a Delaware corporation.

3. On August 8, 1975, an action was filed in the District Court of Santa Fe County, Civil Cause No. 50044, entitled *United Nuclear Corporation* v. *General Atomic Company, Gulf Oil Corporation and Scallop Nuclear, Inc.*, defendants, which cause was removed to the United States District Court for the District of New Mexico, Civil Cause No. 75-582-B. Included within the scope of the issues raised by the complaint in that cause were all issues arising under the 1973 Supply Agreement.

4. On September 11, 1975, GAC, Gulf and Scallop filed a Motion for Extension of Time in Civil Cause No. 75-528-B requesting additional time within which to answer or otherwise plead to UNC's complaint and to answer or object to UNC's interrogatories. As grounds for their motion, movants stated that the time was necessary to determine whether to seek arbitration of the issues. GAC has known at all material times that it had a right to demand arbitration against UNC.

5. On October 6, 1975, Gulf Oil Corporation filed a Motion for Extension of Time in Civil Cause No. 75-528-B, acknowledging in that motion that failure to demand arbitration prior to answering the complaint or filing such answer without asserting the affirmative defense of compulsory arbitration might constitute a waiver of Movant's right to compel arbitration.

6. On December 31, 1975, following its voluntary dismissal of Cause No. 75-528-B in the United States District Court for the District of New Mexico, UNC filed suit against GAC in the District Court of Santa Fe County, Civil Cause No. 50827. Interrogatories were served upon GAC simultaneously with service of the complaint. The complaint and the interrogatories, both vir-

tually identical to those filed in Cause No. 50044, included within their scope of all the issues arising out of the 1973 Uranium Supply Agreement. GAC disqualified, on the grounds of bias, the Honorable Santiago Campos from presiding in said cause.

7. On January 19, 1976, GAC filed a federal interpleader action in United States District Court for the District of New Mexico, Civil Cause No. 76-092-B, against UNC, Duke Power Company (Duke), Commonwealth Edison Company (Commonwealth), Indiana & Michigan Electric Company (I&M) and Detroit Edison Company (Detroit). GAC's complaint, while stating that it was not waiving its right to arbitration, sought judicial determination of the rights and obligations of all the parties in that cause under the 1973 Supply Agreement and the various utility agreements. That cause was dismissed by order entered on March 2, 1976 for lack of subject matter jurisdiction. GAC appealed and the dismissal was affirmed in April of 1977. *General Atomic Co.* v. *Duke Power Co., et al.*, 553 F.2d 53 (10th Cir. 1977).

8. No jurisdictional issue in this cause remains. Jurisdiction of the trial court was affirmed by the New Mexico Supreme Court in an appeal brought by GAC. *United Nuclear Corporation* v. *General Atomic Co.*, 560 P.2d 161 (1976).

9. On May 5, 1976, GAC, after having sought and obtained an extension of time within which to answer, filed its answer to UNC's complaint, and a counterclaim against UNC. In its counterclaim, GAC sought judicial determination of the respective rights and obligations of GAC and UNC under the 1973 Uranium Supply Agreement, an order directing specific performance of those obligations and monetary damages, both compensatory and punitive. GAC also alleged that UNC had violated the New Mexico Antitrust Statutes, § 49-1-1, *et seq.*, N.M.S.A., 1953 and sought over 1 billion dollars in damages for said violation.

10. In its Eighth Defense contained in its Answer, GAC stated that some of the issues in this case are subject to arbitration and that it anticipated becoming involved in arbitration with Duke Power Company (Duke) and Commonwealth Edison Company (Commonwealth), and wanted UNC to be a part to those proceedings. GAC specifically excluded from the scope of its arbitration demand all other arbitrable issues, including any concerning the validity and enforceability of the 1973 Uranium Supply Agreement. GAC further stated that to the extent possible, it intended to conduct the arbitration of the issues jointly with the arbitration of the same issues between the respective power companies and itself.

11. On June 4, 1976, UNC filed its Reply to defendant's counterclaims. At that time, all issues related to the 1973 Supply Agreement were before the court on the pleadings of the parties. All of the issues raised are inextricably intertwined with the antitrust allegations raised by both parties.

12. At no point between the commencement of the first action, filed as Cause No. 50044 in District Court for Santa Fe County, New Mexico, and the filing of the pending Motion for Stay (a period of more than two years), did GAC file a demand for arbitration, petition any court for an order compelling arbitration, petition this court for a stay of proceedings pending arbitration, or in any way manifest its intention or desire to arbitrate rather than litigate the issues between the parties arising under the 1973 Supply Agreement.

13. On April 2, 1976, the court preliminarily enjoined GAC, its partners, privies, agents, servants and employees, from filing or prosecuting any other action against UNC in any other forum relating to any of the rights, claims, or the subject matter of this action. The injunction was sought and issued in the context of GAC's announced intention of instituting litigation against

UNC in other jurisdictions and of joining UNC in pending or contemplated arbitration proceedings instituted by the utilities. The preliminary injunction did not prohibit GAC from demanding arbitration with UNC in this forum.

14. Two utilities, Duke and Commonwealth, have demanded arbitration with GAC pursuant to arbitration clauses contained in the Duke and Commonwealth La Salle agreements. These contracts contain no arbitration agreements between GAC and UNC.

15. In December of 1976, GAC moved to join as parties two utilities—I&M and Detroit. I&M consented to joinder and Detroit was joined by order of the Court.

16. Pursuant to its defense against the claims stated by UNC and in attempt to prove the claims stated in its counterclaim, GAC engaged in extensive discovery in this case, taking more than 100 depositions totaling more than 16,000 pages of testimony and involving 2,785 deposition exhibits. GAC copied more than 500,000 pages of documents produced to it during discovery at UNC's corporate offices from early May until June, 1977. GAC also propounded and received answers to two voluminous sets of interrogatories served on UNC.

17. On August 22, 1977, the Pretrial Order was signed. GAC drafted the portion of the Order which related to its claims against UNC. In this Order, GAC did not state arbitration as a defense to the claims arising under the 1973 Supply Agreement, nor did it indicate an intention or a desire to resolve the disputed issues by arbitration rather than litigation.

18. On September 19, 1977, GAC filed a Motion for Partial Summary Judgment. Pursuant to that motion, GAC sought a judicial determination that the 1973 Supply Agreement was not procured by fraud or coercion, that the Agreement was not in violation of the New Mexico Antitrust Laws, that UNC had subsequently

ratified the 1973 Supply Agreement, and that UNC's performance of the 1973 Supply Agreement is not excused on the grounds of commercial impracticability. On October 27, 1977, the court rendered a judicial determination that the Motion for Summary Judgment was not well taken and the Motion was, therefore, denied.

19. On October 31, 1977, the parties to this cause proceeded with the trial on the merits and said trial has continued for more than a month.

20. In numerous instances, GAC has invoked the appellate jurisdiction of the courts of New Mexico by filing appeals or petitioning for writs of prohibition or superintending control relating to jurisdiction of the trial court, failure to disqualify plaintiff's counsel, entry of the preliminary injunction, failure to join indispensable parties, failure to grant a continuance of the trial and to obtain a modification of the preliminary injunction pursuant to the opinion of the United States Supreme Court.

21. GAC has repeatedly, during the course of these proceedings, obtained Orders allowing extensions of time to file motions; to respond to motions; to file memoranda; to compel discovery; to respond to discovery at all times representing to the court that such Orders were necessary for its preparation for trial.

22. On November 28, 1977, GAC declared in open court that it intended to pursue relief under the Federal Arbitration Act and requested the court to stay the trial of this case pending resolution of those matters. The court declined to stay proceedings.

23. On November 30, 1977, GAC filed a motion for a stay of all proceedings in this action on the grounds that it had that day demanded arbitration between GAC and UNC on all issues relating to the validity, enforceability and interpretation of the 1973 Supply Agreement.

24. From the commencement of the original action until the present, UNC has made tremendous expenditures of time, effort and money in the preparation of its case for trial on the merits and in providing to GAC all of the materials which it sought in discovery to which it was entitled under the Rules of Civil Procedure of the State of New Mexico.

25. As a result of its discovery efforts undertaken in this judicial proceeding pursuant to the Rules of Civil Procedure of New Mexico, GAC has acquired huge amounts of information from UNC which would not otherwise be available to it.

26. UNC has been prejudiced by GAC's failure to timely demand arbitration and UNC will be irreparably injured if the proceedings in this cause were stayed and arbitration ordered.

27. From the commencement of the original action in August, 1975, until the filing of the present motion, a period of more than 27 months, GAC has, with knowledge of its rights, not demanded, or sought to compel arbitration with UNC. GAC is in default and has voluntarily and intentionally relinquished any rights it may have had to arbitrate with UNC.

28. The arbitration clause contained in Article XVII of the 1973 Supply Agreement is limited in scope to those issues which may be resolved by an application of the terms and conditions of the 1973 Supply Agreement.

29. The 1974 Uranium Concentrates Agreement contains no arbitration clause.

30. There is no just reason to delay the entry of a partial final judgment herein in accordance with these Findings of Fact and Conclusions of Law.

CONCLUSIONS OF LAW

1. This Court has jurisdiction pursuant to §§ 22-3-9, *et seq.*, N.M.S.A., 1953, to stay arbitration proceedings between UNC and GAC.

2. GAC has claimed that it is entitled to assert certain rights under the Federal Arbitration Act. This Court's order staying arbitration proceedings shall not in and of itself, operate to preclude GAC from asserting its claimed federal rights in appropriate judicial proceedings. GAC has waived and is in default of all rights it may have had to have its disputes with UNC determined in arbitration.

3. Neither the Duke nor Commonwealth Agreements give GAC any rights to demand arbitration with UNC.

4. The arbitration clause of the 1973 Supply Agreement, if valid, allows only those issues which may be resolved by an application of the terms and conditions of the 1973 Supply Agreement to be submitted to arbitration.

5. The issues arising under the New Mexico Antitrust Laws, § 49-1-1, *et seq.*, N.M.S.A., 1953 may not be submitted to arbitration.

6. All issues in this case are so intertwined with issues arising under the New Mexico Antitrust Laws that none of the issues can properly be submitted to arbitration.

7. There is no just reason to delay the entry of a partial final judgment in accordance with these findings of fact and conclusions of law.

8. The arbitration proceedings heretofore filed by GAC against UNC should be stayed.

/s/ Edwin L. Felter
District Judge

[December 16, 1977]

APPENDIX J

IN THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION, a Delaware corporation,
Plaintiff,

v.

GENERAL ATOMIC COMPANY, a partnership composed of GULF OIL CORPORATION and SCALLOP NUCLEAR, INC., *et al.*,
Defendants.

PARTIAL FINAL JUDGMENT

This matter having come on to be heard before the Court upon defendant General Atomic Company's Motion To Stay Proceedings, the parties having appeared by their respective counsel of record and the Court now being sufficiently advised, and

The Court having thereafter made and entered its findings of fact and conclusions of law in respect to the issues raised by said Motion, and

It further appearing to the Court that pursuant to the provisions of Rule 54(b)(1) in the New Mexico Rules of Civil Procedures, and the Uniform Arbitration Act, § 23-3-9, *et seq.*, N.M.S.A., 1953 (1975 Supp.), and the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, there is no

just reason for delay in the entry of a partial final judgment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that General Atomic Company's Motion to Stay Proceedings, be and the same hereby is denied. Provided, however, that this Partial Final Judgment shall not, in and of itself, operate to preclude Defendant General Atomic Company from asserting claimed federal rights in appropriate judicial proceedings.

/s/ Edwin L. Felter
District Judge

[Entered December 27, 1977]

IN THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO,
COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION, a Delaware corporation,
Plaintiff,

v.

GENERAL ATOMIC COMPANY, a partnership composed of GULF OIL CORPORATION and SCALLOP NUCLEAR, INC., *et al.*,
Defendants.

DECISION OF THE COURT

Defendant, General Atomic Company, having filed a motion to stay these proceedings, with Bigbee, Stephenson, Carpenter and Crout appearing as counsel for plaintiff and Rodey, Dickason, Sloan, Akin & Robb; Montgomery, Andrews & Hannahs; and Howrey & Simon appearing as counsel for defendant; the Court having considered the allegations and proof of the parties, argument of counsel and authorities cited, and being otherwise fully advised, finds generally in favor of plaintiff and against defendant and hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff, United Nuclear Corporation (UNC), is a Delaware corporation, and is qualified to do business in New Mexico.

2. Defendant, General Atomic Company (GAC), is a general partnership composed of Gulf Oil Company (Gulf), is a Pennsylvania corporation, and Scallop Nuclear, Inc. (Scallop), a Delaware corporation.

3. On August 8, 1975, an action was filed in the District Court of Santa Fe County, Civil Cause No. 50044, entitled *United Nuclear Corporation* v. *General Atomic Company, Gulf Oil Corporation and Scallop Nuclear, Inc.*, defendants, which cause was removed to the United States District Court for the District of New Mexico, Civil Cause No. 75-582-B. Included within the scope of the issues raised by the complaint in that cause were all issues arising from the 1973 Supply Agreement.

4. On September 11, 1975, GAC, Gulf and Scallop filed a Motion for Extension of Time in Civil Cause No. 75-528-B requesting additional time within which to answer or otherwise plead to UNC's complaint and to answer or object to UNC's interrogatories. As grounds for their motion, movants stated that the time was necessary to determine whether to seek arbitration of the issues. GAC has known at all material times that it had a right to demand arbitration against UNC.

5. On October 6, 1975, Gulf Oil Corporation filed a Motion for Extension of Time in Civil Cause No. 75-528-B, acknowledging in that motion that failure to demand arbitration prior to answering the complaint or filing such answer without asserting the affirmative defense of compulsory arbitration might constitute a waiver of Movant's right to compel arbitration.

6. On December 31, 1975, following its voluntary dismissal of Cause No. 75-528-B in the United States District Court for the District of New Mexico, UNC filed suit against GAC in the District Court of Santa Fe County, Civil Cause No. 50827. Interrogatories were

served upon GAC simultaneously with service of the complaint. The complaint and the interrogatories, both virtually identical to those filed in Cause No. 50044, included within their scope all of the issues arising out of the 1973 Uranium Supply Agreement. GAC disqualified, on the grounds of bias, the Honorable Santiago Campos from presiding in said cause.

7. On January 19, 1976, GAC filed a federal interpleader action in United States District Court for the District of New Mexico, Civil Cause No. 76-092-B, against UNC, Duke Power Company (Duke), Commonwealth Edison Company (Commonwealth), Indiana & Michigan Electric Company (I&M) and Detroit Edison Company (Detroit). GAC's complaint, while stating that it was not waiving its right to arbitration, sought judicial determination of the rights and obligations of all the parties in that cause under the 1973 Supply Agreement and the various utility agreements. That cause was dismissed by order entered on March 2, 1976 for lack of subject matter jurisdiction. GAC appealed and the dismissal was affirmed in April of 1977. *General Atomic Co.* v. *Duke Power Co., et al.*, 553 F.2d 53 (10th Cir. 1977).

8. No jurisdictional issue in this cause remains. Jurisdiction of the trial court was affirmed by the New Mexico Supreme Court in an appeal brought by GAC. *United Nuclear Corporation* v. *General Atomic Co.*, 560 P.2d 161 (1976).

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and punitive. GAC also alleged that UNC had violated the New Mexico Antitrust Statutes, § 49-1-1, *et seq.*, N.M.S.A., 1953 and sought over 1 billion dollars in damages for said violation.

10. In its Eighth Defense contained in its Answer, GAC stated that some of the issues in this case are subject to arbitration and that it anticipated becoming involved in arbitration with Duke Power Company (Duke) and Commonwealth Edison Company (Commonwealth), and wanted UNC to be a party to those proceedings. GAC specifically excluded from the scope of its arbitration demand all other arbitrable issues, including any concerning the validity and enforceability of the 1973 Uranium Supply Agreement. GAC further stated that to the extent possible, it intended to conduct the arbitration of the issues jointly with the arbitration of the same issues between the respective power companies and itself.

11. On June 4, 1976, UNC filed its Reply to defendant's counterclaim. At that time, all issues related to the 1973 Supply Agreement were before the court on the pleadings of the parties. All of the issues raised are inextricably intertwined with the antitrust allegations raised by both parties.

12. At no point between the commencement of the first action, filed as Cause No. 50044 in District Court for Santa Fe County, New Mexico, and the filing of the pending Motion for Stay (a period of more than two years), did GAC file a demand for arbitration, petition any court for an order compelling arbitration, petition this court for a stay of proceedings pending arbitration, or in any way manifest its intention or desire to arbitrate rather than litigate the issues between the parties arising under the 1973 Supply Agreement.

13. On April 2, 1976, the court preliminarily enjoined GAC, its partners, privies, agents, servants and employ-

ees, from filing or prosecuting any other action against UNC in any other forum relating to any of the rights, claims, or the subject matter of this action. The injunction was sought and issued in the context of GAC's announced intention of instituting litigation against UNC in other jurisdictions and of joining UNC in pending or contemplated arbitration proceedings instituted by the utilities. The preliminary injunction did not prohibit GAC from demanding arbitration with UNC in this forum.

14. Two utilities, Duke and Commonwealth, have demanded arbitration with GAC pursuant to arbitration clauses contained in the Duke and Commonwealth La Salle agreements. These contracts contain no arbitration agreements between GAC and UNC.

15. In December of 1976, GAC moved to join as parties two utilities—I&M and Detroit. I&M consented to joinder and Detroit was joined by order of the Court.

16. Pursuant to its defense against the claims stated by UNC and in attempt to prove the claims stated in its counterclaim, GAC engaged in extensive discovery in this case, taking more than 100 depositions totaling more than 16,000 pages of testimony and involving 2,785 deposition exhibits. GAC copied more than 500,000 pages of documents produced to it during discovery at UNC's corporate offices from early May until June, 1977. GAC also propounded and received answers to two voluminous sets of interrogatories served on UNC.

17. On August 22, 1977, the Pretrial Order was signed. GAC drafted the portion of the Order which related to its claims against UNC. In this Order, GAC did not state arbitration as a defense to the claims arising under the 1973 Supply Agreement, nor did it indicate an intention or a desire to resolve the disputed issues by arbitration rather than litigation.

18. On September 19, 1977, GAC filed a Motion for Partial Summary Judgment. Pursuant to that motion, GAC sought a judicial determination that the 1973 Supply Agreement was not procured by fraud or coercion, that the Agreement was not in violation of the New Mexico Antitrust Laws, that UNC had subsequently ratified the 1973 Supply Agreement, and that UNC's performance of the 1973 Supply Agreement is not executed on the grounds of commercial impracticability. On October 27, 1977, the court rendered a judicial determination that the Motion for Summary Judgment was not well taken and the Motion was, therefore, denied.

19. On October 31, 1977, the parties to this cause proceeded with the trial on the merits and said trial has continued for more than a month.

20. In numerous instances, GAC has invoked the appellate jurisdiction of the courts of New Mexico by filing appeals or petitioning for writs of prohibition or superintending control relating to jurisdiction of the trial court, failure to disqualify plaintiff's counsel, entry of the preliminary injunction, failure to join indispensable parties, failure to grant a continuance of the trial and to obtain a modification of the preliminary injunction pursuant to the opinion of the United States Supreme Court.

21. GAC has repeatedly, during the course of these proceedings, obtained Orders allowing extensions of time to file motions; to respond to motions; to file memoranda; to compel discovery; to respond to discovery at all times representing to the court that such Orders were necessary for its preparation for trial.

22. On November 28, 1977, GAC declared in open court that it intended to pursue relief under the Federal Arbitration Act and requested the court to stay the trial of this case pending resolution of those matters. The court declined to stay proceedings.

23. On November 30, 1977, GAC filed a motion for a stay of all proceedings in this action on the grounds that it had that day demanded arbitration between GAC and UNC on all issues relating to the validity, enforceability and interpretation of the 1973 Supply Agreement.

24. From the commencement of the original action until the present, UNC has made tremendous expeditures of time, effort and money in the preparation of its case for trial on the merits and in providing to GAC all of the materials which it sought in discovery to which it was entitled under the Rules of Civil Procedure of the State of New Mexico.

25. As a result of its discovery offering undertaken in this judicial proceeding pursuant to the Rules of Civil Procedure of New Mexico, GAC has acquired huge amounts of information from UNC which would not otherwise be available to it.

26. UNC has been prejudiced by GAC's failure to timely demand arbitration and UNC will be irreparably injured if the proceedings in this cause were stayed and arbitration ordered.

27. From the commencement of the original action in August, 1975, until the filing of the present motion, a period of more than 27 months, GAC has, with knowledge of its rights, not demanded, or sought to compel arbitration with UNC. GAC is in default and has voluntarily and intentionally relinquished any rights it may have had to arbitrate with UNC.

28. The arbitration clause contained in Article XVII of the 1973 Supply Agreement is limited in scope to those issues which may be resolved by an application of the terms and conditions of the 1973 Supply Agreement.

29. The 1974 Uranium Concentrates Agreement contains no arbitration clause.

30. There is no just reason to delay the entry of a partial final judgment herein in accordance with these Findings of Fact and Conclusions of Law.

CONCLUSIONS OF LAW

1. This Court has jurisdiction pursuant to §§ 22-3-9, *et seq.*, N.M.S.A., 1953 (the Uniform Arbitration Act) or 9 U.S.C. § 1 *et seq.* (the Federal Arbitration Act) or both, to determine whether GAC may properly demand arbitration with UNC.

2. GAC has waived any rights to demand arbitration from UNC and has been in default in exercising these purported rights.

3. GAC's motion to stay these proceedings should be denied.

4. GAC has claimed that it is entitled to assert certain rights under the Federal Arbitration Act. This Court's order staying arbitration proceedings shall not in and of itself, operate to preclude GAC from asserting its claimed federal rights in appropriate judicial proceedings. GAC has waived and is in default of all rights it may have had to have its disputes with UNC determined in arbitration.

5. Neither the Duke nor Commonwealth Agreements give GAC any rights to demand arbitration with UNC.

6. The arbitration clause of the 1973 Supply Agreement, if valid, allows only those issues which may be resolved by an application of the terms and conditions of the 1973 Supply Agreement to be submitted to arbitration.

7. The issues arising under the New Mexico Antitrust Laws, § 49-1-1, *et seq.*, N.M.S.A., 1953 may not be submitted to arbitration.

8. All issues in this case are so intertwined with issues arising under the New Mexico Antitrust Laws that none of the issues can properly be submitted to arbitration.

9. There is no just reason to delay the entry of a partial final judgment in accordance with these findings of fact and conclusions of law.

10. The arbitration proceedings heretofore filed by GAC against UNC should be stayed.

/s/ Edwin L. Felter
District Judge

[December 27, 1977]

APPENDIX K

AMERICAN ARBITRATION ASSOCIATION

No. 73-10-0078-77

IN THE MATTER OF AN ARBITRATION BETWEEN
GENERAL ATOMIC COMPANY (GAC)

and

UNITED NUCLEAR CORPORATION (UNC)

PARTIAL AWARD

RES JUDICATA, FULL FAITH AND CREDIT WAIVER OF ARBITRATION

This arbitration is conducted under the auspices of the American Arbitration Association pursuant to a demand for arbitration filed by General Atomic Company (GAC) upon United Nuclear Corporation (UNC) on November 29, 1977.

The arbitration clause is as follows:

> In the event that any disputes, which may arise between the parties during the course of this Agreement, cannot be mutually resolved, either party may elect to submit such disputes to arbitration in accordance with the Rules of the American Arbitration Association. Upon notice of such election, each party shall designate one member of the arbitration panel and the designees shall choose an impartial third member who shall chair the panel.

> The panel shall hear and consider the position of each party and shall equitably resolve the dispute by a determination based on the terms and conditions of this Agreement. Such determination shall be final and binding on both parties and judgment upon the award rendered by the Arbitrators may be entered in any Court having jurisdiction thereof.

Under that clause GAC has designated Willard Wirtz as its arbitrator and UNC has designated Julian Levi as its arbitrator. Those designees chose Walter V. Schaefer as the impartial third member and chairman of the panel. It should be noted at the outset that at the first arbitration hearing each of the party designated arbitrators stated his intention to be completely impartial with respect to any determinations made by the panel. It should also be noted that UNC is participating in this arbitration under protest.

To an unusual degree, the outcome of this arbitration depends not only upon the terms of the contract and the conduct of the parties thereunder but also upon the significance of several judgments of the Supreme Court of the United States, the Supreme Court of New Mexico and the United States District Court for New Mexico, as well as other judicial decisions. A summary of prior events and proceedings is essential to an understanding of the issues that now confront the arbitration panel.

GAC is a partnership composed of Gulf Oil Corporation (Gulf) and Scallop Nuclear, Inc. (Scallop). (There were references at a hearing before the Panel on March 26, 1979, to a change in the relationship of the partners. Whatever may be the internal effect of that change, it can not alter the rights and liabilities of the partnership with respect to third persons.) UNC owns uranium deposits in New Mexico and is engaged in mining and milling uranium and the fabrication of uranium into fuel.

Between 1966 and May of 1971 UNC entered into long term agreements with four utilities to supply them with large quantities of uranium concentrates and with finished nuclear-reactor fuel. In the summer of 1971 UNC and Gulf formed a jointly owned corporation known as Gulf United Nuclear Fuels Corporation (GUNF). UNC owned 43% of the stock of GUNF, and Gulf owned 57%. By what is known as the 1971 Supply Agreement UNC then assigned its agreements with the utilities to GUNF, and agreed to supply GUNF with the uranium necessary to perform those contracts. UNC retained its mining and milling properties and facilities, but transferred its fabrication facilities to GUNF. Thereafter, in 1973 Gulf purchased UNC's interest in GUNF which became a wholly owned subsidiary of Gulf. UNC and GUNF then entered into the agreement which is the subject of this arbitration, which is referred to as the 1973 Supply Agreement. That agreement replaced the 1971 Supply Agreement.

GUNF was then merged into Gulf and in 1974 Gulf transferred to GAC the agreements with the utilities and the rights and obligations under the 1973 Supply Agreement, as well as the physical facilities of GUNF.

The price of uranium began to increase sharply during and after 1973 and it has continued to rise at least until the commencement of the hearings in this arbitration. Until the summer of 1975 UNC continued to deliver uranium pursuant to the 1973 supply agreement.

In 1975 UNC ceased to make deliveries, and on August 8, 1975, UNC brought an action in Santa Fe District Court against GAC, Gulf and Scallop. The complaint alleged that the 1973 supply agreement was void as a result of Gulf and GAC's fraud, economic coercion, breach of fiduciary duties and violations of the New Mexico antitrust act. The complaint also sought relief on the ground that performance of its long term agree-

ments had become commercially impractical. The defendants removed the action to the United States District Court on diversity grounds. UNC then voluntarily dismissed its action on December 31, 1975.

On the same day UNC instituted another action in the Santa Fe County District Court. The complaint was identical with that filed in the earlier action, except that diversity of citizenship was eliminated because Gulf and Scallop were not named as defendants in the second action.

GAC filed motions to dismiss. On March 15, 1976, at the request of UNC, the trial judge entered a temporary restraining order, and on April 2, 1976 a temporary injunction, directed to GAC and its partners. The injunction stated: "This injunction prohibits the institution or prosecution of ordinary litigation, third party proceedings, cross-claims, arbitration proceedings or any other method or manner of instituting actions, claims or demands relating to the subject matter of this lawsuit, or including United Nuclear Corporation as a party thereto." On April 14, 1976 the New Mexico Supreme Court granted an alternative writ of prohibition staying "the enforcement of the injunction". On June 15, 1976, however, that court, without opinion, quashed the alternative writ as improvidently granted. GAC sought a writ of certiorari to review that judgment of the Supreme Court of New Mexico. UNC opposed the allowance of certiorari on the theory that the judgment was based upon adequate state grounds.

The Supreme Court of the United States issued a memorandum order on November 29, 1976 (429 U.S. 973, 50 L.Ed.2d, 581, 97 S.Ct. 479), which stated that the petition for writ of certiorari to the Supreme Court of New Mexico was granted and the judgment of that Court was vacated and the cause remanded to the Supreme Court

of New Mexico to consider whether the judgment was "based upon Federal or State grounds or both." Pursuant to that mandate the Supreme Court of New Mexico rendered its further opinion on February 21, 1977. (560 Pac.2d. 541.) The Court there held that the New Mexico trial court had inherent equity power to issue an injunction restraining the parties to a suit before it from instituting further proceedings concerning the same subject matter.

The case was brought again to the Supreme Court of the United States, which granted certiorari and on October 31, 1977 reversed the judgment of the Supreme Court of New Mexico and remanded the case to that Court for "further proceedings not inconsistent with this opinion." The Chief Justice and six Associate Justices concurred in the per curiam opinion. Mr. Justice Blackmun would not have disposed of the case summarily but would have granted certiorari and heard argument. Mr. Justice Rhenquist dissented. *General Atomic Co.* v. *Felter*, 434 U.S. 12, 54 L.ed. 2d 199.

While the authority of the Santa Fe trial court to enjoin federal arbitration and judicial proceedings was being determined in the United States Supreme Court, activity had continued in the trial court. On April 5, 1976, UNC had filed an amended complaint which added a count alleging that a 1974 supply agreement between GAC and UNC was also invalid because of economic coercion; on May 5, 1976, GAC had answered the amended complaint and filed a counterclaim, and there had been extensive discovery. (Whether GAC had waived its right to arbitrate by any action it took in this case or in other proceedings will be subsequently discussed.)

The case had been set for trial in the Santa Fe court on October 31, 1977. That was the day on which the Supreme Court of the United States entered its judg-

ment reversing the Santa Fe court's injunction and holding:

> "We conclude that the New Mexico Supreme Court's distinction is un-tenable and that *the injunction is in direct conflict with* that decision and *the Supremacy Clause of the Constitution.*" (Emphasis supplied. The decision referred to is *Donovan* v. *Dallas*, 337 U.S. 408 (1964).)

On November 3, 1977 GAC made an oral motion to vacate the injunction. UNC opposed the motion. Its attorney suggested that UNC might file a petition for rehearing, and urged the court to wait for the mandate of the Supreme Court of New Mexico. He stated: "We need the injunction more than ever." By agreement the motion to vacate was continued until November 6, 1977, and on that date it was denied. The injunction remained in effect and the trial proceeded while the formal mandates were making their way back from the Supreme Court of the United States to the Supreme Court of New Mexico, and from that court to the Santa Fe court.

When the mandate got back to Santa Fe, the court modified its injunction on November 28, 1977. On November 29, 1977, GAC filed its demand for arbitration, and on the following day moved to stay proceedings in the Santa Fe court. On December 6, 1977, UNC moved for an order staying the arbitration and submitted proposed findings and conclusions and a proposed partial final judgment.

On December 16, 1977, the Santa Fe court adopted the proposed findings of fact and conclusions of law concerning the "issue of arbitration" which had "been submitted for summary determination on December 6, 1977." On the basis of those findings and conclusions the court entered its "partial final judgment" which stayed "until the further order of the court," the present ar-

bitration proceeding, as well as other arbitration proceedings in North Carolina and Illinois. The order also contained the following provisions:

> "Provided, however that this Partial Final Judgment shall not, in and of itself, operate to preclude Defendant General Atomic Company from asserting claimed federal rights in appropriate judicial proceedings.
>
> IT IS FURTHER ORDERED, DECLARED, DETERMINED AND ADJUDICATED that Defendant General Atomic Company has no right to arbitrate any issue in the aforesaid arbitration proceedings or pending herein against Plaintiff, United Nuclear Corporation."

By a separate order of December 16, 1977, entered in accordance with the following finding,

> "22. On November 28, 1977, GAC declared in open court that it intended to pursue relief under the Federal Arbitration Act and requested the court to stay the trial of this case pending resolution of those matters. The court declined to stay proceedings."

the court denied GAC's motion to stay the trial.

Subsequently, on December 27, 1977, the court entered another "partial final judgment," which again denied GAC's motion to stay proceedings. This latter order was apparently a formal step regarded as necessary or desirable to put the previous order refusing to stay the trial into appropriate form for an interlocutory appeal. It was accompanied by findings and conclusions which were identical with those that accompanied the December 16, 1977 order. Neither set of findings and conclusions, and neither "partial final judgment" mentioned the judgment of the Supreme Court of the United States, which had determined that the injunction that restrained

GAC from seeking federal arbitration was in violation of the Supremacy Clause of the Constitution.

On March 3, 1978, GAC filed a motion in the Supreme Court of the United States for leave to file a petition for an original writ of mandamus directing the Santa Fe court to vacate its orders of December 16, 1977, and December 27, 1977, on the ground that they violated the mandate of the Supreme Court of the United States in *General Atomic* v. *Felter*, 54 L.Ed. 2d 199.

While the case was again making its way to the Supreme Court of the United States, the proceeding before the Santa Fe court was continuing, and on March 2, 1978, the Santa Fe court entered a "Sanctions Order and Default Judgment" which ordered the striking of GAC's answer and counterclaim. That order was entered pursuant to Rule 37 of the New Mexico Rules of Civil Procedure for failure to comply with discovery orders. On April 4, 1978 the Santa Fe Court entered its Declaratory Judgment as to the issues between UNC and GAC. That order stated:

> "A. The 1973 Uranium Supply Agreement executed on September 12, 1973, as of June 30, 1973 between United Nuclear Corporation, Gulf Oil Corporation and Gulf United Nuclear Fuels Corporation is null, void, unenforceable and of no effect whatever and performance thereunder is excused.
>
> B. The Uranium Concentrates Agreement between United Nuclear Corporation and General Atomic Company dated June 28, 1974 is null, void, unenforceable and of no effect whatever and performance thereunder is excused.
>
> C. General Atomic Company is obligated to indemnify and save United Nuclear Corporation harmless from any and all claims, causes of action, liabilities, obligations, damages, costs and expenses

arising out of, or in any way connected with or relating to the latter's failure to deliver or perform under the aforesaid 1973 Uranium Supply Agreement or any other contract with an electric utility company covered by or related to said agreement.

D. General Atomic Company's defenses to United Nuclear Corporation's First Amended Complaint, as set forth in its Answer and in the Pre-trial Order, should be, and is hereby, stricken and held for naught.

E. General Atomic Company's Counterclaim against United Nuclear Corporation and each and every count thereof, as stated in said Counterclaim and in the Pretrial Order should be, and is hereby, stricken and held for naught."

On May 17, 1978, the Santa Fe court entered its final judgment on damage issues in favor of UNC and against GAC.

On May 30, 1978, the Supreme Court of the United States issued its opinion and judgment in the original mandamus action. (436 U.S. 493, 56 L.ed.2d 480). The per curiam opinion stated:

"Petitioner has filed a motion for leave to file a petition for a writ of mandamus and requests that a writ of mandamus issue to the District Court for the First Judicial District, Santa Fe County, N.M., directing the court to vacate two orders on the ground that they violated this Court's mandate in *General Atomic Co.* v. *Felter*, 434 US 12, 54 L Ed 2d 199, 98 S Ct 76 (1977)"

"In that opinion we held that under the Supremacy Clause of the United States Constitution the Santa Fe court lacked power to enjoin General Atomic Company (GAC) from filing and prosecut-

ing in personam actions against United Nuclear Corporation (UNC) in federal court. Upon remand, the Santa Fe court modified its injunction 'to exclude from its terms and conditions all in personam actions in Federal Courts and all other matters mandated to be excluded from the operation of said preliminary injunction by the opinion of the Supreme Court, dated October 31, 1977.' Shortly thereafter, GAC filed a demand for arbitration with UNC of issues growing out of the 1973 uranium supply agreement around which the litigation between the parties revolves. This demand, filed with the American Arbitration Association, relied upon the Federal Arbitration Act, . . . and the arbitration clause of the 1973 agreement."

• • • •

"Finally, GAC requested the Santa Fe court to stay its own trial proceedings with respect to issues subject to these arbitration demands. UNC, in addition to opposing this motion, also asked the court to stay the arbitration proceedings.

On December 16, 1977, the Santa Fe court issued a decision in which it concluded that GAC had waived any right to arbitration with UNC which it might have had because it failed to demand arbitration in a timely manner and that neither the Duke nor Commonwealth Agreements gave GAC any right to demand arbitration with UNC. On the basis of these conclusions, Judge Felter filed the following order staying the arbitration proceedings:

• • • •

"In its order of December 16, 1977, the Santa Fe court has again done precisely what we held that it lacked the power to do: interfere with attempts by GAC to assert in federal forums what it views as its entitlement to arbitration. Clearly, our prior

opinion did not preclude the court from making findings concerning whether GAC had waived any right to arbitrate or whether such a right was contained in the relevant agreements. Nor did our prior decision prevent the Santa Fe court, on the basis of such findings, from declining to stay its own trial proceedings as requested by GAC pending arbitration in other forums. But, as demonstrated supra, we have held that the Santa Fe court is without power under the United States Constitution to interfere with efforts by GAC to obtain arbitration in federal forums on the ground that GAC is not entitled to arbitration or for any other reason whatsoever. GAC, as we previously held, has an absolute right to present its claims to federal forums."

* * * *

"A litigant, who, like GAC, has obtained judgment in this Court after a lengthy process of litigation, involving several layers of courts, should not be required to go through that entire process again to obtain execution of the judgment of this Court. In light of the prior proceedings in this matter, it is inconceivable that upon remand from this Court the Santa Fe court was free to again impede GAC's attempt to assert its arbitration claims in federal forums. Because the Santa Fe court has refused or failed to comply with the judgment of this Court, petitioner's motion for leave to file a petition for a writ of mandamus is granted. Assuming as we do that the Santa Fe court will now conform to our previous judgment by promptly vacating or modifying its order of December 16, 1977 to the extent that it places any restriction whatsoever upon GAC's exercise of its right to litigate arbitration claims in federal forums, we do not at present issue a formal writ of mandamus."

In the following footnote the Supreme Court explained why it did not order the Santa Fe court to vacate or modify its order of December 27, 1977:

> "We do not read the December 27, 1977, order as restricting GAC from pursuing its arbitration claims in other forums. Consequently there is no occasion to disturb it."

The main thrust of the opinion of the Supreme Court of the United States is that under the Supremacy Clause of the federal Constitution the New Mexico trial court lacked power—and therefore was without jurisdiction—to enjoin GAC from presenting its claim to arbitration to a federal arbitration panel. The Court squarely held that by its December 16, 1977 order "the Santa Fe Court has again done precisely what we held that it lacked power to do: interfere with attempts by GAC to assert in federal forums what it views as its entitlement to arbitration." And the Court further pointed out "that the Santa Fe Court is without power under the United States Constitution to interfere with efforts by GAC to obtain arbitration in federal forums on the ground that GAC is not entitled to arbitration or for any other reason whatsoever. GAC, as we previously held, has an absolute right to present its claims to federal forums."

Problems of interpretation of the opinion, however, have resulted from the following two sentences:

> "Clearly, our prior opinion did not preclude the court from making findings concerning whether GAC has waived any right to arbitrate or whether such a right was contained in the relevant agreements. Nor did our prior decision prevent the Santa Fe Court, on the basis of such findings, from declining to stay its own trial proceedings as requested by GAC pending arbitration in other forums."

On the basis of these two sentences UNC argues that the Supreme Court has decided that the Santa Fe court had jurisdiction to determine whether GAC had any right to arbitrate and if it did, whether that right had been waived. UNC also argues that the Supreme Court has determined that the Santa Fe court properly refused to stay its own trial proceedings pending arbitration.

There is a surface plausibility to these contentions, but they will not withstand analysis in the light of the procedural posture of the case before the Supreme Court of the United States and the limitations upon that Court's jurisdiction in an original action of mandamus.

The issuance of such a writ to compel obedience to a prior mandate of the Supreme Court of the United States is an extraordinary remedy, and under the Supreme Court's procedural and jurisdictional rules, the mandamus petition filed by GAC could present to the Court only the question of compliance with the Supreme Court's prior mandate. (See Supreme Court Rule 31 (3).) It could not properly bring before that Court any matters that were not embraced within that prior determination.

In applying those rules the Supreme Court recently stated in *Helstoski* v. *Meanor*, 61 L.ed 2d 30, 33 (June, 1979.):

> "Almost a hundred years ago this Court explained, 'The general principle which governs proceedings by mandamus is that whatever can be done without the employment of that extraordinary writ, *may not be done with it.* It lies only when there is practically *no other remedy.*' *Ex parte Rowland*, 104 U.S. 604, 617 (1882) (emphasis added). More recently we summarized certain considerations for determining whether the writ should issue;
>
> > 'Among these are that the party seeking issuance of the writ have no other adequate means

> to attain the relief he desires, and that he satisfy "the burden of showing that [his] right to issuance of the writ is 'clear and indisputable'." Moreover, it is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed.' *Kerr* v. *United States District Court*, 426 U.S. 394, 403 (1976) (citations omitted.)"

This is what the Supreme Court had in mind when it pointed out that "clearly" its prior determination had not expressed any judgment whatsoever with respect to the questions of GAC's right to arbitrate, its waiver of that right, or the authority of the Santa Fe court to stay its own trial proceeding. Since those questions had not even been determined by the Santa Fe court when the Supreme Court's prior opinion was announced, it is obvious that they were not embraced within the prior judgment of the Supreme Court. Consequently, they could be determined by that Court in the original action for mandamus which was pending before it. And as the Supreme Court of the United States pointed out in its footnote 2 (56 L.Ed. 485) the Supreme Court did not disturb the Santa Fe Court's order of December 27, 1977 because it did not regard that order as restricting GAC from pursuing its arbitration claims in other forums.

On July 31, 1978 UNC instituted an action in the United States District Court for the District of New Mexico seeking to enjoin the American Arbitration Association from proceeding with the present arbitration. In addition to injunctive relief the Complaint sought a declaratory judgment that the AAA had no right to proceed with the pending arbitration or to force UNC to participate in it. The Complaint recited the institution of UNC's action against GAC in the Santa Fe court,

the removal of that case and its subsequent dismissal by UNC. It alleged the institution of the second action in the Santa Fe court, the filing of arbitration demands by GAC on November 30, 1977, and the December 16, and December 27, 1977 orders of the Santa Fe Court. Concerning the judgment of the Supreme Court of the United States which was handed down on May 30, 1978, the Complaint stated:

> "On May 30, 1978 the U.S. Supreme Court issued its opinion holding that the December 16, 1977 Judgment was in error, and also holding that the Santa Fe County District Court had the power to make the findings of fact, conclusions of law and enter the Partial Final Judgment of December 27, 1977.

The Complaint further alleged that on January 12, 1978 the AAA had suspended the present arbitration and on July 26, 1978 had notified UNC that it was lifting the suspension and at the same time directed UNC to appoint an arbitrator. The Complaint further alleged the entry of the April 4, 1978 Final Judgment of the Santa Fe Court and stated that it was pending on appeal in the Supreme Court of New Mexico.

Count I of the Complaint alleged that the judgments of the Santa Fe Court were *res judicata* and that they barred and collaterally estopped any attempts by the AAA to proceed with arbitration. Count I also asserted that any "arbitration proceeding instituted by the AAA would deprive UNC of the right to receive full faith and credit for the December 27, 1977 and April 4, 1978 judgments of the Santa Fe County District Court guaranteed to it by Article IV Section One of the Constitution of the United States. More over, any attempt by the AAA to proceed with arbitration would violate the Federal Arbitration Act, 9 USC § 1 *et seq.*"

Count II of the complaint sought a temporary restraining order as well as a preliminary injunction and tendered a bond to secure the payment of any damages suffered by AAA if the temporary restraining order should subsequently be found to be wrongfully entered.

Count III sought damages in a large amount "which may exceed $1,000,000" as a result of AAA proceeding with the arbitration. That Count also sought expenses which "may exceed the sum of $50,000."

Count IV consisted of a detailed description of events which took place with respect to the actions instituted by UNC in the Santa Fe court and the orders and pleadings in those cases. It alleged that as a result of the discovery orders entered by that Court UNC has incurred tremendous expenditures of time, effort and money in the preparation of the case for trial on the merits and has been prejudiced by GAC's failure "to timely demand arbitration" and that UNC would be irreparably injured if arbitration were ordered." It also alleged that GAC was in default and had voluntarily and intentionally relinquished any rights it may have had to arbitrate. Count IV further alleged:

> "The arbitration clause contained in Article XVII of the 1973 Supply Agreement is limited in scope to those issues which may be resolved by an application of the terms and conditions of the 1973 Supply Agreement. Claims of fraud, antitrust, commercial impracticability or other claims extrinsic to the contract may not be arbitrated.

Count IV further alleged that GAC had failed to elect to proceed with arbitration within a reasonable time and that any right it may have had to do so had lapsed. UNC prayed for a declaration that the AAA had no right to proceed with any arbitration.

Before the United States District Court UNC argued that its Complaint should not be dismissed for want of

an indispensable party—GAC—and argued that UNC had no alternative forum. It stated:

> "There is one factor mentioned in Rule 19(b) that UNC believes to be controlling. That is:
>
> 'whether the Plaintiff will have an adequate remedy if the action is dismissed for non-joinder.'
>
> This portion of Rule 19(b) requires a court to consider whether the plaintiff can sue effectively in other forums where better joinder would be possible. *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102 (1968); *Pennwalt Corp. Inc.* v. *Train, supra.*
>
> UNC has no other forum available to vindicate its rights. The May 30, 1978 opinion of the U.S. Supreme Court held that a state court may not enjoin arbitration which has been invoked under the Federal Arbitration Act. Only a federal court may do so. Thus UNC has no alternative remedies available to it.

To this argument the American Arbitration Association responded:

> "The Third factor to consider is whether the Plaintiff will have an adequate remedy if the action is dismissed. The obvious answer is arbitration, which Plaintiff voluntarily agreed to utilize in the 1973 Agreement with GAC. All of the issues including those of waiver of the right to arbitrate could be raised and adjudicated by the arbitrators. *Prima Paint Corp.* v. *Flood & Conklin*, 388 U.S. 395, 18 L.ed.2d 1270 (1967) The alternative forum need not be judicial. *See Tewa Tesuque* v. *Morton*, 498 F.2d 240 (1974), *cert. denied.* 420 U.S. 962, 43 L.ed.2d 440 (1975) where the court held that a New

Mexico Pueblo tribal council afforded an adequate forum, thereby warranting dismissal of the Complaint."

In his Memorandum Opinion dismissing the case for want of jurisdiction, Judge Bratton stated:

"UNC has argued that there is no alternative forum, and that only a federal court can enjoin these arbitration proceedings. The AAA, on the other hand, argues that the arbitration panel itself can entertain the questions of *res judicata* and full faith and credit. This alternative appears to be an acceptable one. The language of the arbitration clause in the disputed contract appears broad enough to allow the arbitrators to hear this issue, and the AAA has itself acknowledged that it will consider the question. Though UNC would then have to go to arbitration to determine the initial propriety of the arbitration forum, their arguments would in fact be heard and considered. The inconvenience and cost to UNC of this route does not outweigh the prejudice to GAC if this action continues in its absence. The fact that the alternative forum is non-judicial does not seem relevant. The Tenth Circuit has previously approved consideration of a non-judicial forum, *Tewa Tesuque* v. *Morton* 498 F.2d 240 (10th Cir. 1974), *cert. denied* 420 U.S. 962, and arbitration is a recognized arena for the settlement of disputes."

After its motion for reconsideration and for an injunction pending appeal had been denied by the Federal District Court, UNC appealed to the United States Court of Appeals for the 10th Circuit. Subsequently, it voluntarily dismissed that appeal.

After the termination of that litigation, the present arbitration panel was designated. UNC designated its

arbitrator under protest. Preliminary hearings were held on December 13, 1978, and January 25 and 26, 1979. Thereafter, in accordance with the instructions of the panel, each party filed an initial statement, followed by a reply statement.

GAC's initial statement of position before the arbitration panel described the 1973 Supply Contract, alleged breach of that contract by UNC, and the remedies for that breach. It also discussed the scope of discovery to be permitted in this arbitration, and the significance of the disqualification of UNC's counsel by the United States Court of Appeals for the Seventh Circuit. (*Westinghouse Electric Corp.* v. *Gulf Oil Corp.*, 588 F2d 221 (1978).

In its first statement of position UNC described certain issues relating to the basic arbitrability of the UNC-GAC dispute under the caption: "Preliminary Issues". It stated that these issues must be resolved before consideration can be given to further proceedings relating to the merits. The preliminary issues so specified by UNC are:

B. *The December 27, 1977 Partial Final Judgment is Entitled to "Full Faith and Credit" and Prohibits Arbitration in the UNC-GAC Disputes.*

C. *The Partial Final Judgment of December 27, 1977 is Res Judicata and Bars further Proceedings Herein.*

D. *The April 4, 1978 Final Declaratory Judgment is Entitled to Full Faith and Credit; is Res Judicata and Bars Arbitration.*

E. *There is no Agreement Extant by Which UNC and GAC Agreed to Arbitrate.*

F. *GAC Made no Timely Election to Arbitrate the Issues It Attempts to Raise Herein, and Arbitration is Accordingly Barred.*

G. *GAC Never Gave Timely Notice to UNC of any Purported Election to Arbitrate the Issues Hereof.*

H. *GAC Lost its Right to Elect to Arbitrate.*

I. *GAC Has Waived its Right to Arbitration.*

J. *Antitrust Issues Are Not Arbitrable.*

K. *Any Remaining Issues are So Intertwined with Antitrust Issues That None Can Be Arbitrable.*

L. *The Arbitration Clause of The 1973 Supply Agreement is Narrow and Allows Few Issues to be Arbitrated.*

M. *As A Matter of Comity The Arbitration Should Not Proceed Until GAC's Two Appeals Are Resolved.*

N. *UNC Is Not a Party To Any Contract With GAC Which Provides For Arbitration.*

O. *Alternatively, GAC is Not the Legal Representative and Successor of Any Party to the 1973 Uranium Supply Agreement.*

UNC's second statement of position reiterated its protest against the "very existence of this arbitration" and any of its proceedings. UNC therefore refused to file any further statement addressing its preliminary issues, its discovery demands or its defenses to GAC's claim, and stated:

> This Second UNC Statement of Position addresses the true "preliminary issues" i.e., whether judgments of the Santa Fe District Court in Case No. 50827 are *res judicata* as to all issues in this pro-

ceeding and whether the Panel must accord those judgments "full faith and credit" as required by the Constitution of the United States. The other issues identified as relating to arbitrability are subsumed and merged into the Santa Fe judgments and are also *res judicata* in this proceeding. Consequently, except as specifically noted herein, UNC respectfully declines to address the other matters raised in the Panel's February 5 memorandum to the parties. To do so would expose UNC to an unacceptable risk that it may waive a position otherwise available to it. Any consideration of arbitration other than to dismiss or indefinitely stay the arbitration pending final appellate review of the Santa Fe judgments deprives UNC of constitutional rights it cannot relinquish.

UNC does address, in detail, the *res judicata* and "full faith and credit" issues below. Those issues are not intertwined with any other conceivable issue in this arbitration and must be determined independently of and before all other issues. To continue further with this arbitration without a determination of the very issues which would moot further proceedings prejudices UNC and denies it the protection of the Constitution. Therefore, UNC respectfully submits that the Panel must decide, as soon as possible, the issues of *res judicata* and "full faith and credit."

UNC's position concerning *res judicata*, collateral estoppel and full faith and credit focuses upon the December 27, 1977, March 27 and April 4, 1978 judgments of the Santa Fe court. The December 27, 1977 judgment which refused to stay the trial on the ground that GAC had waived its rights to arbitration was affirmed by the Supreme Court of New Mexico on May 7, 1979, and GAC's petition for certiorari to review

that judgment has been denied by the Supreme Court of the United States. (48 U.S. Law Week 3236, October 7, 1979) The other judgments of the Santa Fe court are pending upon appeal in the Supreme Court of New Mexico. They do not directly bear upon GAC's right to Federal arbitration or the Santa Fe court's jurisdiction to prevent the exercise of that right. We agree with UNC's contention that the unreversed judgment of a New Mexico trial court has the same effect by way of *res judicata* and collateral estoppel, and is entitled to the same degree of full faith and credit, as is a judgment of the Supreme Court of New Mexico. The denial of a petition for certiorari by the Supreme Court of the United States carries no implication or inference concerning that Court's view of the merits of the case. *See, e.g., Hughes Tool Co.* v. *T.W.A.*, 409 U.S. 353, 34 L.ed. 2d 577.

UNC's position rests upon the basic principle that the judgment of a court having jurisdiction of the parties and the subject matter is *res judicata* and entitled to full faith and credit even though it is erroneous. For that principle it relies upon and cites many authorities. The basic principle is sound. It is not, and indeed could not, be disputed. Nor is it disputed that the Santa Fe court initially had jurisdiction of the parties and the subject matter. UNC therefore concludes: "The judgments in Case No. 50827 are entitled to 'full faith and credit' and therefore bar arbitral consideration of all GAC claims in this proceeding."

The difficulty with this conclusion is that it ignores the judgment of the Supreme Court of the United States which squarely held on October 31, 1977, that the Santa Fe court's injunction against arbitration was "in direct conflict with the Supremacy Clause of the Constitution." It also ignores the second judgment of the Supreme Court of the United States, entered on May 30, 1978,

which reiterated the conclusion that the Santa Fe court was "without power under the United States Constitution to interfere with efforts by GAC to obtain arbitration in federal forums on the ground that GAC is not entitled to arbitration or for any other reason whatsoever." UNC contends that because the Supreme Court of the United States did not vacate the December 27, 1977 judgment of the Santa Fe court, it affirmed the jurisdiction of that court to proceed with the trial and to enter its subsequent judgments. For this position it relies upon the two sentences in the Supreme Courts May 30, 1978 opinion which have already been discussed. For the reasons we have stated, we are unable to concur in UNC's interpretation of those sentences.

The authorities cited by UNC and the arguments it advances simply do not address the unique full faith and credit question which this matter presents: What effect is to be given to a judgment entered by a state court after it has unlawfully barred a litigant from pursuing the federal remedy to which he is entitled?

In *Kalb* v. *Feuerstein*, 308 U.S. 433, 440 (N.2) 1940, the Supreme Court made this observation:

> "That a State court before which a proceeding is competently initiated may—by operation of supreme Federal law—lose jurisdiction to proceed to a judgment unassailable on collateral attack is not a concept unknown to our Federal system."

In the exercise of its power under the Commerce-Clause of the Constitution of the United States, Congress enacted the Federal Arbitration Act, which gives parties the right to agree to submit to arbitration their disputes arising under contracts involving interstate commerce. The Supreme Court of the United States has twice held that the Santa Fe court exceeded its jurisdiction and violated the Supremacy Clause of the Constitution when it prevented GAC from exercising that right by its injunction.

In *Gordon* v. *Longest*, 16 Peters 97, 10 L.ed. 900 (1842) a circuit court in Kentucky denied the defendant's motion to remove the action to the Federal court although the action was between citizens of different states and the declaration alleged that the requisite jurisdictional amount was involved. After the circuit court refused to allow removal, it proceeded with the trial before a jury. There was a verdict for the plaintiff, and judgment was entered on the verdict. The Court of Appeals of Kentucky affirmed. The Supreme Court of the United States reversed, holding:

> "The defendant was entitled to a right under the law of the United States; and, on the facts of the case, the judge had no discretion to withhold that right. No objection can be made to the form of the application, nor to the facts on which it was founded. This being clear, in the language of the above act, it was the duty of the State court to "to proceed no further in the cause." " And every step subsequently taken, in the exercise of a jurisdiction in the case, whether in the same court or in the Court of Appeals, was coram non judice.
>
> * * * *
>
> One great object in the establishment of the courts of the United States and regulating their jurisdiction was to have a tribunal in each State, presumed to be free from local influence, and to which all who were non-residents or aliens might resort for legal redress. But this object would be defeated if a State judge, in the exercise of his discretion, may deny to the party entitled to it a removal of his cause.
>
> A more summary remedy might have been pursued by the defendant than the one which this court can now give to him. But the cause being brought before us through the Supreme Court of

> the State, we reverse the judgment of affirmance by that court, and direct the cause to be remanded, with instructions that it shall be transmitted to the Circuit Court of the State, which shall be directed to enter an allowance of the petition of the defendant for the removal of the cause to the Circuit Court of the United States for the District of Kentucky, nunc pro tunc."

It is not only State courts that are required to honor the Congressional policy in favor of permitting parties to contracts involving interstate commerce to choose to submit their disputes to arbitration instead of litigation. In *Evans* v. *Hudson Coal Co.*, 165 Fed 970 (CA3, 1948), the court held that a motion for a stay pending arbitration asserted a defense of lack of jurisdiction of the subject matter authorized by FRCD Rule 12(b)(1). The court stated:

> "Rule 12(b)(1) will authorize the defendant to make an application for a stay pending arbitration if, as a matter of law, the issues presented by the instant suit are referable to arbitration. The pertinent language of Rule 12(b)(1) provides that a defense of "lack of jurisdiction over the subject matter", at the option of the pleader, may be asserted "by motion". If the issues presented by the instant suit are referable to arbitration, the court below, other conditions of the Arbitration Act being met, must grant the stay and hold its hand until arbitration be completed. It is thus, pending arbitration, deprived of jurisdiction of the subject matter."

And in *Harper Sibley* v. *Tandy Corporation*, 543 F.2d 540, (CA5, 1976) the federal district court had entered a substantial judgment on a jury verdict in favor of the plaintiff after a trial that consumed 14 days and involved 22 witnesses and more than 100 documentary exhibits. The Court of Appeals reversed that judgment on the ground that the defendant's timely motion "to have the

contract claims submitted to arbitration and to have the federal securities law claims stayed pending arbitration" should have been allowed. The court said:

> "The parties, by their agreement, committed the resolution of contractual disputes to arbitration. Both the policy behind the United States Arbitration Act and considerations of judicial economy required that Parker's contractual claims be submitted to arbitration and that the federal securities law claims be stayed pending the outcome of those proceedings."

When the foregoing authorities are applied to the present case, the conclusion is inescapable that the Santa Fe Court lacked jurisdiction to proceed after it had unlawfully issued its injunction which prohibited GAC from exercising its Federal remedy. The lack of jurisdiction to issue the injunction appears "on the face of the judgment roll." Unless judgments of the Supreme Court of the United States are to be treated as meaningless gestures, the subsequent proceedings of the Santa Fe court were, in the language of the Supreme Court, "coram non judice," and they are not entitled to full faith and credit.

It is the Panel's determination that all proceedings in the Santa Fe court following the entry of its illegal injunction restraining GAC from exercising its contractual right to arbitrate were coram non judice and that no subsequent proceedings in that court or elsewhere reinvested that court with jurisdiction over the controversy which is the subject of this arbitration. Those subsequent proceedings are therefore not res judicata and they are not entitled to full faith and credit.

* * * *

WAIVER

In our consideration of UNC's contention that GAC has waived its right to arbitration, we focus upon the

conduct of GAC prior to the invalid order of April 2, 1976. GAC at once attacked that order, and pursued the attack until the order was finally set aside. In the meantime, the Santa Fe court proceeded with the New Mexico litigation. GAC had no alternative. Its failure to defend in that proceeding would have risked default judgment, and any further move toward arbitration would have invited contempt proceedings. When the barrier of the April 2 order was ultimately removed by the Supreme Court of the United States, GAC moved immediately on November 30, 1977, to take this controversy to arbitration. So whatever occurred between April 2, 1976 and November 30, 1977, while GAC was vindicating its contractual right to arbitrate by "a lengthy process of litigation, through several layers of courts" could not legitimately be viewed as constituting waiver by GAC of that right.

The facts underlying UNC's claim that GAC had by its actions prior to April 2, 1976, waived its right to arbitrate are not disputed. The factual record and the arguments of the parties based upon the undisputed facts have been presented to the Panel in documents submitted by the parties in other proceedings which have been incorporated in the Panel record by reference. In considering this issue we shall first state the facts which are relied upon to establish waiver and then discuss their significance.

The first action brought by UNC in the Santa Fe court named GAC and its constituent partners as defendants. It was filed in the Santa Fe court August 8, 1975, and was removed by the defendants to the United States District Court. After UNC's motion to remand had been argued, UNC voluntarily dismissed the case on December 31, 1975. On the same day UNC filed its second complaint in the Santa Fe court. This complaint was identical with the first except that this one did not name as

defendants the partners who owned GAC, thus apparently eliminating diversity jurisdiction in the federal court. No answer had been filed in that proceeding before it was voluntarily dismissed by UNC and although GAC had obtained extensions of time within which to respond to the complaint, the motions for those extensions asserted that time was necessary to determine whether to seek arbitration.

In the second action in the Santa Fe court GAC filed several motions: a motion to disqualify a particular judge; a motion to dismiss for want of personal jurisdiction; a motion to dismiss for failure to join indispensable parties and a motion for an order extending the time within which to answer and to answer interrogatories that had been served with the complaint. The first motion to dismiss asserted that it was filed "without waiving its right to demand arbitration on all causes and issues raised by UNC herein,". The other motions, with the exception of the motion to disqualify, and for extension of time were accompanied by reservations of the right to arbitrate.

On March 12, after UNC had filed an application in the Santa Fe court for a default judgment on the ground that GAC had not answered UNC's interrogatories, a written agreement was signed wherein GAC agreed to answer the interrogatories within twenty days. Nothing was said in that agreement about reserving arbitration rights. UNC then withdrew its application for a default judgment.

During the period prior to the issuance of the injunction against arbitration, GAC also filed an interpleader action in the United States District Court for the District of New Mexico. The complaint in the interpleader action contained the following reservation:

> "The filing and prosecution of this suit is not intended to or deemed to be a waiver of plaintiffs'

> rights to have arbitration under one or more of the agreements hereafter described as the UNC Agreements or the 1973 Uranium Supply Agreement, except as to those issues that are within the jurisdiction of and are actually and directly determined by this court."

The defendants were UNC and electric public utilities which had entered into agreements with UNC or GUNF for the purchase of uranium concentrate for use in nuclear reactors in generator plants. The action was dismissed in the District Court and the Tenth Circuit Court of Appeals affirmed (*General Atomic Co.* v. *Duke Power Co.*, 553 F.2d 53 (1957). The affirmance was based upon lack of jurisdiction in that GAC was not being subjected to conflicting claims by two or more defendants which arose out of the same obligation of the plaintiff, and that GAC was therefore not a stakeholder in the federal interpleader sense even though it stood to be subjected to conflicting decisions which might hold GAC liable to the utilities and UNC not liable to GAC.

On March 15, 1976 UNC sought and obtained from Judge Felter a ten-day temporary restraining order prohibiting GAC from instituting suit or filing a third party complaint against United Nuclear involving "any of the subject matters of this suit." Hearing on UNC's application for a preliminary injunction was set to be held within ten days.

On or about March 20, counsel for GAC wrote to UNC counsel "advising plaintiff that Duke Power Company had demanded arbitration with GAC and that GAC might seek to require plaintiff's participation if plaintiff chose not to participate." (See UNC's August 6, 1976, Application for Default Judgment.) In what was apparently the same connection GAC included in its March 23 response to UNC's March 15 motion for a preliminary injunction, this statement: "In order to protect its interest

and to avoid inconsistent results, it will probably be necessary for GAC to implead or otherwise joint [sic] UNC in some or all of the actions involving the power companies . . . ." This prospect was discussed in considerable detail at a March 24 hearing before Judge Felter on the application for a preliminary injunction. Counsel for defendant confirmed that GAC, "unless restrained by Your Honor, may well take some action in North Carolina to make them [UNC] a party to the arbitration where we are already a party . . . ." (Hearing Transcript, pp. 37-38.) UNC counsel stated to Judge Felter (Transcript, pp. 17-18): ". . . I don't know in how many unknown places in arbitration and other proceedings UNC will be expected to appear . . . . So I ask that the order be expanded under any proceedings, including an arbitration proceeding."

In response to UNC's request, the preliminary injunction stated:

> "It is therefore ordered that General Atomic Company . . . [is] hereby preliminarily enjoined and prohibited from filing or prosecuting any other action or actions against United Nuclear Corporation in any other forum relating to any rights, claims or the subject matter of this action. This injunction prohibits the institution or prosecution of ordinary litigation, third party proceedings, crossclaims, arbitration proceedings or any other method or manner of instituting or prosecuting actions, claims or demands relating to the subject matter of this lawsuit, or including United Nuclear Corporation as a party . . . ."

Since the first action filed by UNC was voluntarily dismissed after it had been removed to the federal court, we do not regard anything that occurred during the pendency of that action as significant insofar as waiver of arbitration is concerned. To the extent that what took

place in that action is at all relevant the conduct of GAC in that action clearly indicates its preference for a federal rather than a state forum, as well as its desire not to waive its right to arbitrate.

Again, in the second action filed in the Santa Fe court GAC clearly indicated, in its first substantive motion, its desire not to waive its right to arbitrate. That position was reiterated on numerous occasions. We do not regard as essential that a formal reservation of the right to arbitrate in every procedural step be taken in the course of that action. There is no doubt that GAC's reservations were adequate to inform UNC of its consideration of an arbitration panel as an alternative forum and there could be no possible claim of surprise on the part of UNC. Indeed, it was precisely because UNC anticipated that GAC would resort to arbitration that it requested the injunction prohibiting GAC from doing so.

The interpleader action filed by GAC in the federal district court indicated a desire for a federal forum and particularly for a forum before which both UNC, as the seller to GAC and the utilities as the ultimate purchasers from GAC might be brought so that the possibility of conflicting judgments could be avoided. And in the interpleader action it was specifically stated that if the federal district court accepted jurisdiction over this entire controversy, GAC would abandon its contractual right to arbitration; and equally specifically that this right was being preserved if the court should decline jurisdiction. Closely comparable situations have been presented in a number of other cases. In *General Guaranty Insurance Co.* v. *New Orleans General Agency, Inc.*, (427 F.2d 824, 5th Cir. 1970.) the defendant in an action for alleged breach of contract responded to plaintiff's complaint by answering and at the same time filing a counterclaim that depended on impleading a third party. Recognizing that the interpleader action might or might not be per-

mitted, the defendant expressly reserved its right to arbitrate under its contract with plaintiff if the interpleader suit should be denied. The Fifth Circuit held that the defendant had acted properly in reserving its right to arbitration under the contract if its attempted interpleader action was unsuccessful. In *Gavlik Construction Co.* v. *H. F. Campbell Co.* v. *The Wickes Corp.*, 526 F.2d 777 (3rd Cir. 1975) the court approved the district court finding in *Gavlik Construction Co.* v. *H. F. Campbell Co.*, 389 F. Supp. 551 (W.D. Pa. 1975) that the filing of a third-party complaint in an attempt to consolidate pending actions was "certainly not waiver but . . . a procedurally sound attempt to achieve a desired result." (389 F. Supp. at p. 553).

There are two elements in the present case either of which precludes a finding of waiver of GAC's contractual arbitration right on this record as it stood on April 2, 1976. First, there had been no answer filed to UNC's complaint. In *Chatham Shipping Co.* v. *Fertex Steamship Corp.*, 352 F.2d 291, 293 (2d Cir. 1965). Judge Friendly summarized the general rule which has subsequently been applied repeatedly, even to alleged waiver by a party plaintiff: "The cases are altogether clear that the mere filing of an action for damages on a contract does not preclude a subsequent change of mind in favor of arbitration therein provided . . .: the earliest point at which such preclusion may be found is when the other party files an answer on the merits. The Belize, 25 F. Supp. 663, 664 (S.D. N.Y. 1938)."

There is also the general rule that neither a plaintiff's nor a defendant's participation in judicial proceedings will be found to have waived a contractual right to arbitration unless such participation has prejudiced the other party. *Careich* v. *Rederi A/B Nordie*, 389 F.2d 692, 696 (2d Cir. 1968) "It is not 'inconsistency' but the presence or absence of prejudice which is determina-

tive of the issue" of waiver. *Hart* v. *Orian Insurance Co.*, 453 F. 2d 1358 (10th Cir. 1971); *Shinto Shipping Co., Ltd.* v. *Fibrex & Shipping Co., Inc.*, 572 F. 2d 1328 (9th Cir. 1978). Although UNC claims prejudice to its position in GAC's March 12 agreement to answer UNC's interrogatories, resulting in UNC's withdrawal of its motion for a default judgment, this clearly did not constitute the "substantial prejudice" which is consistently held to be a necessary ingredient of a waiver finding.

The four cases described by UNC in its brief as supporting its waiver claim are all cases in which a party first asserted, or at least pressed meaningfully, its contract arbitration right only after plaintiff's complaint had been answered in a judicial proceeding; in three of the four there had also been preceding combinations of counterclaims, discovery procedures, and arguments and hearings in court on the merits of the controverted issues. *The Belize*, 25 F. Supp. 663 (E.D.N.Y. 1938); *American Locomotive Co.* v. *Gyro Process Co.*, 185 F. 2d 316 (6th Cir. 1950); *Cornell & Co.* v. *Barber & Ross Co.*, 360 F. 2d 512 (D.C. Cir. 1966); *Weight Watchers of Quebec Ltd.* v. *Weight Watchers International Inc.*, 398 F. Supp. 1057 (E.D.N.Y. 1975).

It is the Panel's determination that GAC has not waived its right to arbitration.

* * * *

The Panel will advise the parties through the offices of the American Arbitration Association regarding further proceedings in this case.

/s/ Walter V. Schaefer

/s/ Willard Wirtz

[Entered November 14, 1979]

APPENDIX L

AMERICAN ARBITRATION ASSOCIATION

No. 73-10-0078-77

IN THE MATTER OF AN ARBITRATION BETWEEN
GENERAL ATOMIC COMPANY (GAC)

and

UNITED NUCLEAR CORPORATION (UNC)

PROTEST AND DISSENT TO PARTIAL AWARD

RES JUDICATA, FULL FAITH AND CREDIT WAIVER OF ARBITRATION

November 9, 1979

This Protest and Dissent to the "Partial Award" in this matter:

—Continues the protest heretofore made and throughout asserted by United Nuclear Corporation, Respondent, that these proceedings are altogether improper and illegal.

—Preserves the protest heretofore made that the "Partial Award" has been improperly promulgated contrary to fair and proper procedure and in disregard of the rights of the undersigned as a designated arbitrator in this proceeding.

—Asserts the "Partial Award" in form and substance to be in manifest error and disregard of

> law in that it arrogates powers, prerogatives, and privileges to the arbitrators contrary to fundamental law and public policy, is incomplete and lacking fundamental rationality, and is highly negligent in misrepresentation or neglect of admitted facts and rulings of courts in proceedings of utmost relevance herein.

Contrary to assertions of the "unique full faith and credit question which this matter presents", (Partial Award Pg. 25)* and "problems of interpretation of the Supreme Court opinion" (Partial Award Pg. 13), this matter is altogether plain and straightforward.

The United States Supreme Court in Felter I immediately reached the issue and its decision:

> "General Atomic Company (GAC) challenges the validity of an injunction issued by a New Mexico state court restraining it from filing and prosecuting actions against United Nuclear Corporation (UNC) in federal court. We reverse because under Donovan v. City of Dallas, 377 U.S. 408, 84 S.Ct. 1579, 12 L.Ed.2 409 (1964), it is not within the power of state courts to bar litigants from filing and prosecuting in personam actions in the federal courts." (98 S.Ct. 76)

The judgment of the Supreme Court accordingly was:

> "The judgment of the New Mexico Supreme Court is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion." (98 S.Ct. 79)

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* References are to Partial Award, P.A. or Schaefer, Pg. ——; United Nuclear Corporation—UNC; General Atomic Company—GAC; Gulf Oil Company—Gulf; Felter I—(*GAC* v. *Felter*, 434 U.S. 12; 98 S.Ct. 76; 54 L.Ed.2 199 (1977); Felter II—(*GAC* v. *Felter*, 436 U.S. 493; 98 S.Ct. 1939; 56 L.Ed.2 480 (1978); Judge Edwin L. Felter now Justice Edwin L. Felter of the New Mexico Supreme Court.

Nothing suggests the New Mexico state court's admitted jurisdiction (Partial Award Pg. 24) had been forfeited and the court had become "coram non judice".

Felter II came before the United States Supreme Court as one of three proceedings instituted by GAC, all in March 1978. Full details as to the three proceedings, Nos. 77-1236, 77-1237, 77-1269, are provided in Appendix 1, attached.

Suffice it to say:

> No. 77-1236 was a Petition for Certiorari to review an order of the Supreme Court of New Mexico entered January 11, 1978 denying a Writ of Prohibition to an order entered by Judge Felter on November 18, 1977 requiring the identification of the "Canadian documents".
>
> No. 77-1237 was a motion of GAC for Leave to File a Petition for Mandamus requiring Judge Felter to vacate the orders of December 16, 1977 staying federal arbitration proceedings and December 27, 1977 declining to stay trial proceedings in New Mexico District Court pending prosecution of federal arbitration on the grounds that rights of arbitration had been waived by GAC and the issues were not subject to arbitration since they were intertwined with violations of the New Mexico State anti-trust laws.
>
> No. 77-1269 was a Petition for Certiorari to review an order of the Supreme Court of New Mexico on March 2, 1978 denying GAC's application for original mandamus and prohiibtion to the entry of a sanctions order and default judgment entered by Judge Felter on March 2, 1978.

All three proceedings were held "in tandem on a conference list". The briefs filed by the parties dealt with the consolidated issues and accordingly the United States

Supreme Court was fully aware that the docket in the New Mexico state courts included two final orders then pending on appeal to the New Mexico Supreme Court.

On May 15, 1978, the United States Supreme Court denied certiorari in 77-1236, The Canadian Documents, and in 77-1269 The Sanctions Order and Default Judgment.

Parenthetically, 77-1269 has now been fully briefed and argued before the Supreme Court of New Mexico as Case No. 11988 and No. 12052, consolidated, and awaits decision.

On May 30, 1978, in Felter II, the United States Supreme Court granted Leave to File Mandamus against the December 16 order staying arbitration but refused mandamus as to the December 27 order declining to stay trial proceedings pending arbitration.

The December 27 order was thereafter reviewed by the New Mexico Supreme Court in Case No. 11775 and affirmed on May 7, 1979, —— N.M. ——, 597 P.2d 290, and certiorari denied by the United States Supreme Court on October 9, 1979 in Case No. 79-190.

Felter II is easily understood against this background. There, the United States Supreme Court directed that the order of December 16, 1977 be vacated or modified:

> "to the extent that it places any restriction whatsoever upon GAC's exercise of its right to litigate arbitration claims in federal forums." 436 U.S. at 497; 98 S.Ct. at 1941

However, as to the issues of arbitrability and waiver, the Supreme Court said:

> "Clearly our prior opinion did not preclude the court from making findings concerning whether GAC had waived any right to arbitrate or whether such

a right was contained in the relevant agreements nor did our prior decision prevent the Santa Fe Court on the basis of such findings from declining to stay its own trial proceedings as requested by GAC pending arbitration in other forums." id.

"Preclude" is successor to the old common law plea of precludi non, "the commencement of a replication to a plea in bar, by which the plaintiff says that . . . he *ought not to be barred* from having and maintaining his aforesaid action." The modern preclude, accordingly, is to prohibit or prevent. (Black's Law Dictionary 1060 (5th ed. 1979)

Thus, the United States Supreme Court, with full knowledge of the record in the New Mexico courts, declined to interfere with the pending judicial review by the New Mexico Supreme Court of the December 27, 1977 order, plainly saying its prior opinion did not prevent the Santa Fe court, on the basis of its findings as to waiver and inarbitrability, from declining to stay its own trial proceedings.

The commentator in 54 L.Ed.2 925 had no problem in interpreting Felter II:

> "And in General Atomic Co. v. Felter (1978, US) 56 L.Ed.2 480, 98 S.Ct. 1939, the Supreme Court granted a corporation's motion for leave to file a petition to mandamus a state court with regard to its order staying federal arbitration proceedings by the petitioner against another corporation, on the ground that the order violated the mandate of the Supreme Court in a prior decision in which the Supreme Court had held that under the supremacy clause of the Federal Constitution (Article VI, clause 2), the state court lacked the power to enjoin the petitioner from filing and prosecuting in personam actions in the federal courts. The stay order in question was made after the state court, on

> remand following the Supreme Court's earlier decision in the case, had modified its injunction to exclude from its terms and conditions all in personam actions in federal courts and all other matters mandated to be excluded from the operation of the injunction by the Supreme Court's opinion. Noting that the state court was not precluded by the Supreme Court's prior decision from making findings concerning whether the petitioner had waived any right to arbitrate or whether such a right was contained in a relevant agreement between the petitioner and the second corporation, and that the state court was not prevented, on the basis of such findings that it might make, from declining to stay its own trial proceedings pending arbitration in other forums, the Supreme Court ruled nonetheless that the state court was without power to interfere with the petitioner's efforts to obtain arbitration in federal forums. The Supreme Court, however, declined to issue a formal writ of mandamus, assuming that its previous judgment would be obeyed by the state court by promptly vacating or modifying its order staying arbitration proceedings to the extent that it placed any restriction whatsoever on the applicant's exercise of the right to litigate arbitration claims in federal forums."

The elaborate explanation in the "Partial Award" that the preclude paragraph must be understood as defining postural procedural limits of mandamus (Partial Award Pgs. 13 et seq.) is patently wrong, unnecessary, and oblique.

If the panel had carefully read *Donovan* v. *City of Dallas*, 377 U.S. 408 (1963), they would have learned the issue before the court was *only* the power of the state court to enjoin an action in federal court:

"Early in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings. That rule has continued substantially unchanged to this time. An exception has been made in cases where a court has custody of property, that is, proceedings in rem or quasi in rem. In such cases this Court has said that the state or federal court having custody of such property has exclusive jurisdiction to proceed. Princess Lida v. Thompson, 305 U.S. 456, 465-468. In Princess Lida this Court said "where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other." Id., at 466. See also Kline v. Burke Construction Co., 260 U.S. 226. It may be that a full hearing in an appropriate court would justify a finding that the state-court judgment in favor of Dallas in the first suit barred the issues raised in the second suit, a question as to which we express no opinion. But plaintiffs in the second suit chose to file that case in the federal court. They had a right to do this, a right which is theirs by reason of congressional enactments passed pursuant to congressional policy. And whether or not a plea of res judicata in the second suit would be good is a question for the federal court to decide. While Congress has seen fit to authorize courts of the United States to restrain state-court proceedings in some special circumstances, it has in no way relaxed the old and well-established judicially declared rule that state courts are completely without power to restrain federal-court proceedings in in personam actions like the one here."

Donovan recognized that even though the injunction was invalid the Texas court retained jurisdiction.

> "Whether the Texas court would have punished petitioners [respondents here] for contempt had it known that the restraining order petitioners violated was invalid, we do not know. However, since that question was neither considered nor decided by the Texas court, we leave it for consideration by that court on remand. We express no opinion on that question at this time."

In fact, the return of the Donovan fine subsequently was by order of the Court of Civil Appeals of Texas, 384 S.W.2 724 (1964).

GAC argued this precise issue without success before the New Mexico Supreme Court in the appeal from the December 27 order, 597 P2d. 290 at 309.

> "5. Inconsistency of Proceedings
>
> [33] GAC claims that the actions of the trial court were inconsistent with the holdings of the U. S. Supreme Court in General Atomic Co. v. Felter, 434 U.S. 12, 98 S.Ct. 76, 54 L.Ed.2d 199 (1977). This bears on the district court's determination not to stay the trial on the grounds that GAC had waived its right to arbitrate and that the New Mexico antitrust claims were not arbitrable as a matter of law.
>
> In General Atomic, the Supreme Court ruled that, "it is not within the power of state courts to bar litigants from filing and prosecuting in personam actions in the federal courts." 434 U.S. at 12, 98 S.Ct. at 76. The district court then modified its April 2, 1976 injunction to exclude from its terms and conditions all in personam actions in federal courts "and all other matters mandated to be excluded from the operation of said preliminary injunction by the Opinion of the United States Supreme Court, dated October 31, 1977."

The district court had jurisdiction over the arbitration controversy under the Federal Arbitration Act, at least up to approximately sixty days into the trial of the case on the merits, when GAC made demand for arbitration and moved for a stay in the proceedings. When GAC sought a stay the trial court had the obligation to determine whether the issues involved in the suit were referable to arbitration under the agreements, and whether "the applicant for the stay is not in default in proceeding with such arbitration . . . ." 9 U.S.C. § 3. The trial judge made these determinations in favor of UNC. There is nothing in the Supreme Court's decision that prohibits this type of disposition since it comports with the federal statutes.

[34] There was nothing in the amended injunction which prohibited GAC from demanding arbitration in the case to be conducted in any location, so long as an application was made to the district court to stay the pending trial. The Federal Arbitration Act prevented GAC from proceeding with arbitration without an order from Judge Felter. 9 U.S.C. § 3.

Furthermore, in General Atomic Co. v. Felter, 436 U.S. 493, 496-97, 98 S.Ct. 1939, 58 L.Ed.2d 480 (1978), decided after argument in this case, the Court observed: "Clearly, our prior opinion did not preclude the court from making findings concerning whether GAC had waived any right to arbitrate . . . . Nor did our prior decision prevent the Santa Fe court . . . from declining to stay its own trial . . . ." "

Elemental research and simple due care would have demonstrated that it was the responsibility of Justice Felter to determine arbitrability. The panel is aware that diversity of citizenship was lacking between the parties until sometime in 1979; the "Partial Award" contains pages discussing the Bratton decision which determined

federal court jurisdiction lacking. (Partial Award, Pg. 15 et seq.)

With minimum effort, the panel could have found Commercial Metals v. Balfour, Guthrie, & Co. Ltd. (577 F.2d 264, CCA5 (1978). In *Commercial*, as here, diversity of citizenship did not exist. There, as here, the state court was able as well as required to apply the United States Arbitration Act.

> "[6] It is clear that the state courts are entirely able, as well as required, to apply the United States Arbitration Act and compel arbitration pursuant to the Act if the statutory requisites are present. Coastal States Gas Producing Co. v. Producing Properties, 203 F.Sup. 956 (S.D. Tex. 1962). Indeed, at the request of the parties, we allowed the parties to communicate to the Court, after oral argument, in regard to ongoing state proceedings in which an order compelling arbitration has been sought. It appears to us that the state court is conscientiously fulfilling its duty in deciding the applicability of the Federal Arbitration Act, although, of course, we are not at liberty to speculate as to the correctness of such a determination. We refuse to allow every arbitration agreement concerning a maritime transaction or one involving interstate and foreign commerce to come within the jurisdiction of our district courts through an indirect method that was directly prohibited by Congress. We join the other courts which have considered the matter, and have required an independent judisdictional basis, Robert Lawrence Company v. Devonshire Fabrics, Inc., supra; Amalgamated Ass'n, Etc. v. Southern Busline, supra; Warren Bros. Co. v. Community Bldg. C. of Atl., Inc. 386 F.Supp. 656 (M.D.N.C. 1974); C. P. Robinson Const. Co. v. National Corp. for Hous. Part., 375 F.Supp. 446 (M.D.N.C. 1974); Bangor and Aroostock R. Co.

> v. Maine Central R. Co., supra; Coastal States Gas Producing Co. v. Producing Properties, supra, and have refused to fragment the Arbitration Act. Robert Lawrence Company v. Devonshire Fabrics, Inc., supra; Bengor and Aroostock R. Co. v. Maine Central R. Co., supra; Coastal States Gas Producing Co. v. Producing Properties, supra." (577 F.2 264 at 269 (1978))

It will be noted hereafter state courts do pass upon federal rights and those findings are thereafter, as here, entitled to full faith and credit and res judicata.

On remand of 77-1237, the matter came before the New Mexico Supreme Court in Case No. 11775 on June 21, 1978 whereupon Mr. Justice Payne asked John Eastham, Esq., counsel to GAC:

> "Justice Payne: But they didn't decide that the Santa Fe Court has no power to determine if there had been a waiver of that right?
>
> Mr. Eastham: They did not determine that the December 27th Order, which went into waiver, was or was not proper. That is definitely before you gentlemen:"

The "coram non jucide" argument was made fully in the supplemental briefs as it was made thereafter in the Petition and brief for Certiorari to the United States Supreme Court. On May 9, 1979 the New Mexico Supreme Court affirmed the December 37, [sic] 1977 order in a full opinion of twenty-three pages, —— N.M. ——, 597 P.2d 290. This court found not only that GAC had waived its right to arbitrate *but that the issues of violations of the New Mexico anti-trust laws were intertwined with all other issues and not subject to arbitration.* id 309.

The decision was clearly stated in U.S. Law Week 43 L.W. 3236, (Partial Award, Pg. 23) which appeared at

the time the United States Supreme Court denied GAC's Petition for Certiorari:

> "Arbitration—No. 79-190 General Atomic Co. v. United Nuclear Corp.—Ruling below (NM Sup.Ct., 5/7/79):
>
> Federal Arbitration Act, 9 U.S.C. § 3, mandates that court in which case is pending and in which stay is requested for arbitration has jurisdiction to determine whether movant is "in default and proceeding with such arbitration"; thus state court, rather than arbitration panel, could decide whether party had waived its rights to arbitration; court will take into consideration all material facts to determine whether party to uranium supply contracts containing arbritration clause defaulted on its obligation to make timely demands for arbitration and stay of state-court proceedings and thus waived its rights; substantial evidence supports finding that contracting party, which waited until complex, multi-party, multi-issue litigation in which it was involved was within days of final solution at trial level when it first made demand for arbitration, was in default and thus waived its right to arbitration; enforcement of state antitrust laws by courts rather than by arbitrators is entirely consistent with congressional intent, since state and federal antitrust acts serve to protect same societal interest, and since Federal Arbitration Act itself provides that arbitration agreements in contracts involving commerce are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."

Compare the "Partial Award" summary of the May 7, 1979 Decision of the New Mexico Supreme Court:

> "The December 27, 1977 judgment which refused to stay the trial on the ground that GAC had waived its rights to arbitration was affirmed by the Su-

> preme Court of New Mexico on May 7, 1979, and GAC's petition for certiorari to review that judgment has been denied by the Supreme Court of the United States." (Partial Award, Pg. 23)

The error in this summary, particularly after citation to U.S. Law Week, is astounding, negligent, and wholly malignant. The "coram non judice" argument is confined entirely to waiver.

> "So whatever occurred between April 2, 1976 and November 30, 1977, while GAC was vindicating its contractual right to arbitrate by "a lengthy process of litigation, through several layers of courts" could not legitimately be viewed as constituting waiver by GAC of that right." (Partial Award, Pg. 29)

Non-arbitrability of the issues in this proceeding because of the New Mexico anti-trust law has been asserted by UNC from the inception of the controversy between the parties.

Conclusions of fact 9 and 11 and conclusions of law 7 and 8 of the New Mexico District Court Order of December 27, 1977 found anti-trust issues inarbitrable and all issues in the case so intertwined that none could be submitted to arbitration.

The May 7, 1979 Decision of the New Mexico Supreme Court specifically considered these issues at length and affirmed these conclusions.

The Petition for Certiorari filed by GAC in the United States Supreme Court assigned these rulings as grounds for granting the Writ.

The "Partial Award" of the panel enumerates these issues as preliminary and before the panel. Nevertheless, the "Partial Award" does not consider or even mention these issues at all.

—The res judicata claim of UNC included the anti-trust and intertwinement issues as the panel was fully aware. It is altogether improper and in manifest disregard of law for the res judicata claim to be considered or determined dehors these matters.

—The facts and law relating to the anti-trust and intertwinement issues existed prior to the institution of this litigation, prior to the April 2, 1976 injunction, were in no way affected by that injunction, and cannot be reached by any "coram non judice" consideration.

—The public policy of New Mexico is that issues arising under the New Mexico anti-trust statutes and intertwined matters are to be determined by courts and not by privately paid per diem arbitrators, 597 P.2d. 290 at 311. This fundamental policy is now disregarded by the panel in its wholly invalid assertion of jurisdiction.

—The "Partial Award" denying res judicata and full faith and credit without consideration of the antit-trust and intertwinement issues is not only incomplete and lacking fundamental rationality but is in manifest disregard of law and contrary to public policy. In fact, any lawyer for any party in this proceeding undertaking to argue the res judicata issue would be guilty of gross malpractice if he were to ignore the anti-trust and intertwinement issues.

The direct decisions described involving the precise parties and issues now appearing and asserted before the arbitration panel are cavalierly noted and dismissed with the comment that the Denial of Certiorari carries:

> "no implication or inference concerning that court's view of the merits of the case" (Partial Award Pg. 23).

On June 6, 1979, N. Lewin, Esq., counsel to GAC, wrote to the panel concerning the May 7, 1979 Supreme Court of New Mexico Decision; he stated:

> "GAC will be filing a Petition for a Writ of Certiorari with the Supreme Court of the United States to obtain review of the New Mexico Supreme Court's recent decision. Because the New Mexico decision rests on fundamental errors of federal statutory and constitutional law, we are confident that it will be reversed. The time it takes to secure such reversal should not, however, be utilized to delay rulings by this Panel on "preliminary" issues which have long been ripe for decision or to postpone further sessions going to the merits. If this arbitration is now delayed while the validity of the New Mexico decision is being contested by GAC in the Supreme Court of the United States, the effect will be the same as if Judge Felter's stay order of December 16, 1977, and his injunction against arbitration of April 2, 1976—both vacated summarily by the United States Supreme Court—were still operative." (Appendix 3 attached)

This arbitrator has been particularly interested in hearing the views of the parties as to the three events which occurred subsequent to the March hearings before the panel:

—The affirmance on May 7, 1979 by the New Mexico Supreme Court of the December 27 order of Judge Felter,

—The determination by Judge Enright permitting the filing of the amended complaint in San Diego District Court on August 31, 1979.

—The Denial of Certiorari by the United States Supreme Court on October 9, 1979.

Unfortunately, upon objection, this opportunity has been denied.

While it is true that the Denial of Certiorari by the United States Supreme Court does not create stare decisis, the basic fact is that as between the parties the decision of the New Mexico Supreme Court remains in full force and effect. *Grossgold* v. *Supreme Court of Illinois*, 557 F.2d. 122, CCA7, 1977 at 124:

> "The Illinois Supreme Court, which is fully competent to pass on federal constitutional questions, has passed upon this constitutional question, and its decision became final when the Supreme Court of the United States denied certiorari. Since the Illinois Supreme Court was bound to pass on the constitutional question posed by the pardon, the court's denial of Grossgold's petition for reconsideration necessarily implied that the constitutional question was being decided against the plaintiff. Consequently, there was no arguable constitutional "deprivation" upon which Section 1343 could operate to provide subject matter jurisdiction. The doctrine of res judicata bars any further litigation of this question.
>
> We conclude that plaintiff pursued his proper remedy in the Supreme Court of Illinois and subsequently in the Supreme Court of the United States and is bound by the adverse result." 557 F.2d. 122 at 125.

Brown v. Allen, 344 U.S. 443; 73 S.Ct. 397, often cited for the proposition that the denial of certiorari "imports no expression of opinion upon the merits of a case" went further, however, to describe the effect as between the parties:

> "But denial of certiorari marks final action on state criminal proceedings. In fields other than habeas corpus with its unique opportunity for repetitious litigation, as demonstrated in Dorsey v. Gill,

> 80 U.S.App.D.C. 9; 148 F.2d 857, see 7 F.R.D. 313, the denial would make the issues res judicata."

Another inexcusable error in the "Partial Award" occurs in its assertion:

> "The other judgments of the Santa Fe court are pending upon appeal in the Supreme Court of New Mexico. They do not directly bear upon GAC's right to federal arbitration or the Santa Fe court's jurisdiction to prevent the exercise of that right." (Partial Award, Pg. 23)

The "other judgment" is the sanctions order finding the 1973 Supply Agreement under which *the right of arbitration is asserted* void and unenforceable. (Partial Award, Pgs. 9 et seq.)

Inherent in the "Partial Award" analysis are:

1. Assumption of a non-existent arbitrable right of judicial review of a judgment and decree entered by a state court, affirmed by the court of last resort of that state after full briefing, argument, and review, and to which the United States Supreme Court, again after full briefing, has denied certiorari. This ennoblement is undertaken by an arbitration panel consisting of paid per diem private citizens, acting on its own behalf, appointed by private corporations acting pursuant to a private contract; thus setting up what one panel member tastefully referred to as the "private jurisprudential system" or "second system of jurisprudence". (San Diego Transcript of Proceedings, March 28, 1979, Pg. 253).

This pretension of authority is breathtaking. In *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 at 414; 44 S.Ct. 149 (1923), plaintiffs filed a Bill in Equity in U.S. District Court for the District of Indiana seeking

> "to have a judgment of a circuit court in Indiana which was affirmed by the Supreme Court of the state declared null and void."

There as here, an attempt at direct review by the Supreme Court of the United States had failed. Mr. Justice Van Deventer, speaking for a unanimous court, affirmed a decree dismissing the complaint:

> "It affirmatively appears from the bill that the judgment was rendered in a cause wherein the circuit court had jurisdiction of both the subject matter and the parties, that a full hearing was had therein, that the judgment was responsive to the issues, and that it was affirmed by the Supreme Court of the state on an appeal by the plaintiffs. 131 N.E. 769. If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceedings. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. Elliott v. Peirsol, P Pet. 328, 340, 7 L.Ed. 164; Thompson v. Tolmie, 2 Pet. 157, 169, 7 L.Ed. 381; Voorhees v. Bank * of United States, 10 Pet. 449, 474, 9 L.Ed. 490; Cornett v. Williams, 20 Wall. 226, 249; Ex parte Harding, 120 U.S. 782, 7 S.Ct. 780, 30 L.Ed. 824. Under the legislation of Congress, no court of the United States *other than this court* could entertain a proceeding to reverse or modify the judgment for errors of that character." (Emphasis provided)

Thus, this arbitration panel pretends to authority which no court of the United States, other than the United States Supreme Court possesses.

The extent of this unwarranted pretension is shown in the "Partial Award" itself. Pages 29-37 of the "Partial Award" consider the identical problem of waiver dealt with at length in the opinion of the New Mexico Supreme Court. See 597 P.2d. 290 at 299 et seq.

The "second jurisprudence" doctrine suggests a further interesting alternative. In Deane Hill Country Club, Inc. v. City of Knoxville, 379 F.2d 321, CCA6, 1967, Cert. Denied 389 U.S. 991, plaintiffs filed an action in the U.S. District Court challenging an annexation proceeding previously sustained in state court and affirmed by the state Supreme Court. Again, as here, certiorari was denied by the United States Supreme Court. The 6th Circuit Court of Appeals affirmed the dismissal of the complaint saying:

> "State courts are competent to decide questions arising under Federal Constitution. Federal courts do not provide a forum in which disgruntled parties can relitigate federal claims presented to and decided by state courts."

Apparently "second jurisprudence" is more hospitable in providing a forum "in which disgruntled parties relitigate federal claims presented to and decided by state courts".

The panel, in fact, proceeds beyond the position asserted by counsel for GAC. In *Durfee* v. *Duke*, 375 U.S. 106; 84 S.Ct. 242, (1963), the court considered the requirement of full faith and credit and concluded at Pg. 149:

> "There emerges the general rule that a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that these questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment."

At San Diego, before this panel, counsel for GAC was asked what application he saw for *Durfee* v. *Duke* (San Diego Transcript, March 28, 1979, Pg. 222):

> "Mr. Lewin: In addition to the fact that Durfee versus Duke involved a jurisdictional determination that had been approved by the Highest Court of the State and for which no Petition for Certiorari had been filed. In other words, a parallel. *If UNC were here and this state court injunction had been affirmed by the New Mexico Supreme Court, and the Supreme Court of the United States had denied certiorari, then we'd agree, Durfee versus Duke would be applicable.* It would say that the state judge had jurisdiction to issue his order." (Emphasis supplied)

The "private jurisprudential system" makes no distinction between direct and collateral attack upon a judgment. Certainly a pretense by a private arbitration panel to void a judgment of a court of last resort of one of the sovereign states must appear collateral unless it be claimed that by some unknown arcane process state and federal constitutions had been amended to confer appellate judicial status upon this private entity. Otherwise, *Gordon* v. *Longest*, (16 Peters 97), *Evans* v. *Hudson*, 165 Fed 970 (CA3, 1948), and *Harper* v. *Tandy*, 543 F.2d 540, (CA5, 1976), all involving direct review, are inapplicable.

Stoll v. *Gottlieb*, 305 U.S. 165; 83 L.Ed. 104 (1938), reads directly on the point. There the federal court in a corporate bankruptcy proceeding discharged an individual from liability under his guarantee of a corporate obligation. The bondholder subsequently sued in the municipal court in Chicago. Municipal court held for the bondholder on the basis that the federal court had no jurisdiction. The Appellate Court reversed and its judgment was in turn reversed by the Supreme Court of

Illinois. The United States Supreme Court reversed saying:

> "That a former judgment in a state court is conclusive between the parties and their privies in a Federal court when entered upon an actually contested issue as to the jurisdiction of the court over the subject matter of the litigation, has been determined by this Court in Forsyth v. Hammond. The respondent, Caroline M. Forsyth, sought by injunction in the Federal court to forbid the City of Hammond from collecting taxes on certain lands, annexed to the city by an earlier state court decree. The city contended that the earlier decree was decisive, the respondent that it was void because the enlargement of a city was a matter of legislative, not judicial, cognizance. Without determining the issue whether annexation itself is a function solely of the legislature, this Court upheld the contention of the city on the ground that the respondent had taken an appeal to the Supreme Court of Indiana from the earlier decree of the trial court against her in the annexation proceedings, and had in that appeal attacked the validity of the decree on the ground of lack of jurisdiction. "Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal, acting independently, and having no appellate jurisdiction? The question is not whether the judgment of the Supreme Court would be conclusive as to the question involved in another action between other parties, but whether it is not binding between the same parties in that or any other forum."

Also see Moore's Federal Practice, (2d ed. 1975) 60.25 (2) at 296.

The law of this case itself as made by the parties demonstrates the inapplicability of Kalb v. Feuerstein, 438 U.S

433 (1940). In the actions brought by UNC in federal district court in New Mexico and again initially in the federal district court for the Southern District of California at San Diego, federal jurisdiction was alleged on the basis of the Federal Arbitration Act. GAC successfully moved in each instance to dismiss on the grounds that the Federal Arbitration Act per se does not confer federal jurisdiction (See Appendix 2).

In contrast, *Kalb* arose under the National Bankruptcy Power where the court concluded:

> "The language and broad policy of the Frazier-Lemke Act conclusively demonstrate that Congress intended to and did deprive the Wisconsin County Court of the power and jurisdiction to continue or maintain in any manner the foreclosure proceedings against applicants without the consent, after hearing, of the bankruptcy court in which the farmers petition was then pending."

and the court explained its decision by saying:

> "It is generally true that a judgment by a court of competent jurisdiction bears a presumption of regularity and is not thereafter subject to collateral attack. But Congress, because its power over the subject of bankruptcy is plenary, may by specific bankruptcy legislation create an exception to that principle and render judicial acts taken with respect to the person of property of a debtor whom the bankruptcy law protects nullities and vulnerable collaterally. Although the Walworth County Court had general jurisdiction over foreclosures under the law of Wisconsin, a peremptory prohibition by Congress in the exercise of its supreme power over bankruptcy that no State court have jurisdiction over a petitioning farmer-debtor or his property, would have rendered the confirmation of sale and its enforcement beyond the County Court's power and nullities sub-

ject to collateral attack. The States cannot, in the exercise of control over local laws and practice, vest State courts with power to violate the supreme law of the land. The Constitution grants Congress exclusive power to regulate bankruptcy and under this power Congress can limit the jurisdiction which courts, State or Federal, can exercise over the person and property of a debtor who duly invokes the bankruptcy law. If Congress has vested in the bankruptcy courts exclusive jurisdiction over farmer-debtors and their property, and has by its Act withdrawn from all other courts all power under any circumstances to maintain and enforce foreclosure proceedings against them, its Act is the supreme law of the land which all courts—State and Federal—must observe. The wisdom and desirability of an automatic statutory ouster of jurisdiction of all except bankruptcy courts over farmer-debtors and their property were considerations for Congress alone."

Two cases arising under the National Railroad Bankruptcy Act, enacted by the Congress pursuant to the bankruptcy power as was the case with Frazier-Lemke, determine awards made by arbitrators acting pursuant to the Federal Arbitration Act are of no effect against the bankruptcy trustee: *Penn Central Transportation Co.* v. *National Railroad Passenger Corp.*, 560 F.2d 169, (CCA3 1977) and *National Railroad Passenger Corp.* v. *Blanchette*, 551 F.2d 127, (CCA7 1977), Cert Denied 434 U.S. 856.

The law of this case thus as made by the parties not only demonstrates *Kalb* inapplicable but also determines that rights under the Federal Arbitration Act do not per se confer jurisdiction upon the federal courts or oust the state courts of jurisdiction.

The "second jurisprudence" indeed achieves a peculiar jurisdictional position on its own in relation to the federal courts of this country. Thus, five pages (See Pg. 18-23) are devoted to the proceedings pursuant to Rule 19B of the Federal Rules of Civil Procedure in the U.S. District Court of New Mexico all overtaken by subsequent events first described, incidentally, in hearings before this panel discussing the reshuffling of interests in GAC between Gulf and Scallop. The fact that this "buy-out" has been held by the Federal District Court in San Diego to create presumptive diversity and thus develop federal subject matter jurisdiction is not even acknowledged even though the panel members themselves are parties to this proceedings and appear before that Federal District Court (Appendix 2 attached)

The pompous, corroding error is the misconception of the prerogatives and function of the panel itself. While GAC and UNC will, for understandable reasons of self-interest, dispute and contest, the proper interpretation of the mandate and decisions of Federal and State courts of last resort and review as well as Federal and State Rules of Civil Procedure are matters of public law not contract between the parties. That issue is, of course, not new. See Mr. Justice Powell in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 56; 94 S.Ct. 1011 at 1022:

> "As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the "industrial common law of the shop" and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties: "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dis-

pense his own brant of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 594, 597. 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424 (1960).

Mr. Justice Powell quoted Dean Shulman:

"A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement." Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv.L.Rev. 999, 1016 (1955).

Also see Professor Bernard Meltzer, 43 Chi.L.Rev. 724 (1977) at 730:

"As the Supreme Court observed in Gardner-Denver, those ingredients of arbitration that make it such a valuable adjunct to a system of private ordering, compromise it as an instrument of important public purposes. These ingredients are arbitration's informality, its privacy, its emphasis on finality at the trial level, the ad hoc recruitment of its personnel, and the ecumenical nature of their credentials. Arbitrators, no matter how great their individual competence, lack the institutional credentials that give moral authority to the decisions of the federal judiciary. That authority arises from a complex of tra-

> dition and process, including selection processes, the solemnity with which judges typically function, the publicity of their forum, the respectability and expectation of appellate review, and lifetime tenure. Indeed, there is an ironic twist in attempting to provide by contract that ad hoc arbitrators—the most ephemeral of adjudicators—should have the same authority as life-tenured federal judges."

Concern is expressed lest "judgments of the Supreme Court of the United States are to be treated as meaningless gestures" (Partial Award, Pg. 28). The rhetoric is curious. That court denied mandamus to the December 27, 1977 order at the time the court knew from the record before it that this order and the accompanying gargantuan record would be reviewed by the Supreme Court of New Mexico. Following affirmance the Supreme Court denied certiorari knowing that the effect of denial would leave the judgment in full force and effect between the parties. The course suggested for the "second jurisprudence" is not only to make these direct judgments and orders entered after full briefing, argument, and consideration, meaningless; but, in addition, to sanction for GAC double-scoop litigation. The technique is neither new nor commendable. See Mr. Justice Reed in Stoll v. Gottlieb, supra:

> "Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first."

* * * *

Pursuant to Sections Ten and Eleven of the United States Arbitration Act the "Partial Award" must be vacated, modified, and corrected. The "Partial Award" was improperly promulgated, is beyond the powers of the arbitrators, arrogates to arbitrators illegal and non-existent rights to review and disregard and, in effect, to assert appellate jurisdiction over judgments and decrees of state courts of general jurisdiction, which judgments and decrees have been affirmed after full review by the state court of last resort, and to which affirmance the United States Supreme Court has denied certiorari. In promulgating the "Partial Award", the arbitrators have imperfectly executed their responsibilities in disregarding and ignoring essential, relevant matters and issues before the panel.

The "Partial Award" is based upon manifest errors and disregard of law. The "Partial Award" must be vacated and then modified and corrected to dismiss these proceedings as provided by law.

[Entered November 14, 1979]

APPENDIX M

AMERICAN ARBITRATION ASSOCIATION

No. 73-10-0078-77

IN THE MATTER OF AN ARBITRATION BETWEEN
GENERAL ATOMIC COMPANY
and
UNITED NUCLEAR CORPORATION

FINAL AWARD

During the five years this controversy has been carried through a succession of state and federal courts, twice to the Supreme Court of the United States, there has been no decision on the merits of the underlying issues in dispute. They emerge now as relatively plain and straightforward.

The dispute had its origin in five long term contracts entered into during the period 1966 to 1971 between United Nuclear Corporation (UNC) as producer and seller of uranium, and four electric utility companies as purchasers. As a result of transactions that will be described, UNC became obligated to supply the uranium to General Atomic Corporation (GAC) and GAC became obligated to supply it to the utilities. In August of 1975 UNC stopped making deliveries of uranium and instituted litigation which is still unconcluded.

The Partial Award issued by this Panel on November 14, 1979 recounts the history that preceded it. UNC maintained before the Panel at that stage of the proceedings that the entire matter had been rendered res

judicata by decisions of the courts of New Mexico. Following a full hearing on those preliminary issues in March of 1979, the Panel ruled in its Partial Award that it had jurisdiction to proceed to a determination of the underlying issues on their merits.

I

Before we discuss the merits of the dispute, it is necessary to state certain further procedural developments.

UNC has refused to accept the Panel's jurisdictional determination. On the last day of the Panel's March, 1979 hearings, UNC filed a complaint for an injunction in the United States District Court for the Southern District of California, seeking to restrain the Panel from proceeding. The complaint was dismissed for want of jurisdiction, as were successive amended complaints and an additional action instituted by UNC. These matters are now pending in the United States Court of Appeals for the Ninth Circuit.

The Panel convened a session on March 24, 1980 to set a schedule for hearings on the merits. Arbitrator Julian H. Levi, member of the Panel appointed by UNC, stated at this session that other professional commitments precluded his participation in further hearings until the middle of June, and UNC counsel insisted to the Panel that UNC "will object violently to being deprived of the services of our arbitrator." Hearings on the merits of the issues in controversy, as they had previously been identified by the parties, were therefore set to begin on June 16, 1980 and to continue, if necessary, through July 11th.

On Friday, June 13th, three days before the start of the scheduled hearings, the American Arbitration Association (AAA) regional office in San Diego, where the hearings were to be held, received two telephone calls.

One, from UNC counsel, was to advise that UNC would not participate in the hearings. The other, from Arbitrator Levi, was that he was resigning.

As the hearings opened on June 16, with neither UNC nor Arbitrator Levi present, a UNC emissary appeared only for the purpose of handing to the Panel Chairman and to Arbitrator Willard Wirtz (member of the Panel appointed by GAC) identical letters, signed by UNC Counsel Donnan Stephenson and addressed to all three arbitrators, stating that "United Nuclear Corporation has not participated in the arbitration except in efforts, undertaken under protest, to procure its dismissal and it will not participate in the arbitration or hearings or proceedings therein . . . ." Five reasons were set out:

1. A valid final judgment of the District Court of Santa Fe County, New Mexico, dated December 27, 1977, has determined that GAC has no right to arbitrate with UNC. This judgment was affirmed on appeal by the New Mexico Supreme Court, and certiorari was denied by the United States Supreme Court. *United Nuclear Corporation* v. *General Atomic Co.* 93 N.M. 105, 597 P.2d 290, *cert. denied*, 444 U.S. 911, 100 S.Ct. 222 (1979).

2. A valid final judgment of the District Court of Santa Fe County, New Mexico, dated April 4, 1978, has determined that the 1973 Uranium Supply Agreement—the contract under which arbitration is sought—is "null, void, unenforceable and of no effect whatever."

3. No arbitrable controversies exist between UNC and GAC since all of their claims respecting the 1973 Uranium Supply Agreement have been merged into and set at rest by the aforesaid judgments.

4. No court has ever determined that any dispute between UNC and GAC is arbitrable or ordered UNC to arbitrate such dispute with GAC.

5. For the reasons stated in the attached June 5, 1980 letter to Mr. John Scrivner of the American Arbitration Association, the so-called neutral arbitrator is not qualified to proceed further.

The last of these points was taken up and acted on first. Only a summary is appropriate here. The June 5 letter referred to is attached to this Final Award as Attachment A-1. At the opening of the June 16 hearings, the Panel Chairman made a statement which is set out as Attachment A-2. Under the AAA Commercial Arbitration rules, in a situation of this kind the AAA is to determine whether the Arbitrator should be disqualified and inform the parties of its decision, which is conclusive. AAA Regional Representative in San Diego, John Scrivner, communicated the details of this situation to the central AAA offices. At the opening of the June 17 hearing, Mr. Scrivner reported that the disqualification charge had been overruled. This was confirmed by wire of that date to UNC. See Attachment A-3.

The Panel then turned to a consideration of the other stated grounds for UNC's withdrawal. Section 30 of the current AAA rules covering "Arbitration in the Absence of a Party" provides, as does a comparable provision in the rules in effect in 1973, as follows:

> Unless the law provides to the contrary, the arbitration *may* [underscoring added] proceed in the absence of any party which, after due notice, fails to be present or fails to obtain an adjournment. An award shall not be made solely on the default of a party. The Arbitrator shall require the party who is present to submit such evidence as the Arbitrator may require for the making of an award."

So far as the first provision of Section 30 is concerned, no common law or statutory constraint on proceeding with an arbitration when one party has withdrawn has been found. UNC has not identified any such constraint. Inquiry made of AAA's General Counsel reveals none. The Panel's independent inquiry, though not exhaustive, confirms this.

In exercising the discretion given it under Section 30, the Panel took account of the fact that the first three reasons for non-participation stated by Mr. Stephenson in his June 13 letter had been squarely rejected by the Panel in its Partial Award of November 14, 1979. The only remaining stated reason—that "No court has ever determined that any dispute between UNC and GAC is arbitrable or ordered UNC to arbitrate such with GAC" —can have no meaning apart from the first three assertions, for virtually all arbitration proceeds without prior judicial orders.

It was accordingly determined that the arbitration should proceed under the rule established by Section 30. To follow any other course would obviously sanction a facile means of frustrating the arbitration process.

The Panel then considered, in consultation with AAA regional representative Scrivner, whether the resignation of Arbitrator Levi presented a question separate and apart from the withdrawal of UNC. It was concluded that it did not.

This conclusion was reached with recognition of and respect for the fact that Arbitrator Levi's resignation might or might not be identified with UNC's withdrawal from the proceeding. The virtually simultaneous receipt by the AAA regional office of advice of the two actions on June 13th was taken into account. Arbitrator Levi's telephone call had included no accompanying explanation. A confirmatory letter to Mr. Scrivner, dated June 13 and received on June 17, read in full:

> "I resign effective at once as Arbitrator in the matter of *General Atomic Company* v. *United Nuclear Corporation*—73-10-078-77."

Section 20 of the AAA Rules, paralleling a rule previously in effect, provides:

> If any Arbitrator should resign, die, withdraw, refuse, be disqualified or be unable to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these Rules and the matter shall be reheard unless the parties shall agree otherwise.

Section 14 of the AAA rules (continuing a previous provision) authorizes the AAA to appoint arbitrators where "the parties" fail to do so under the terms of their agreement.

Both Section 20 and Section 14 appear to apply primarily to "neutral arbitrator" situations rather than to "party appointed arbitrators" as these terms are used in the AAA Rules. They could not, as a practical matter, be applied to a situation in which an arbitration agreement provides for each party's appointment of one of three arbitrators, one of the party-appointed arbitrators resigns, and the party appointing him has terminated its participation in the proceedings.

It was accordingly determined on June 17 to adjourn the hearing until June 23, with formal notice to UNC of this schedule so that there would be opportunity for it to take whatever course it chose concerning its participation in the hearings and its appointment of an arbitrator to replace Mr. Levi. Nothing further was heard from UNC. The hearings were reconvened on June 23, and continued to completion on July 2. On July 2, several hours after the close of the hearings, the AAA Regional office received a further communica-

tion from Mr. Levi, confirming his telephone conversation of June 30 with Mr. Scrivner, which Mr. Scrivner had reported informally to the Panel members. Mr. Levi has asked that this letter be placed in the record of these proceedings and the record was reopened for that purpose. (See Attachment A-4)

On June 17 and again at the opening of the Panel hearings on June 23, it was made plain that UNC's non-participation in the hearings would not be considered in any way a basis for a default determination by the Panel. Note was taken of UNC's arrangements for daily receipt of the transcript and an electronic tape of each day's Panel hearing. No off-the-record discussions were thereafter held between either member of the Panel and GAC representatives.

The chairman directed attention to UNC's previous representations to the Panel regarding the position it would take with respect to the substantive issues in this case as summarized in UNC's Memorandum of Position, submitted in response to a Panel request:

> UNC will raise all issues determined to be arbitrable that it raised in the Santa Fe case between it and GAC. A short statement of the claim is that UNC has no obligation to deliver uranium to GAC and that the 1973 Supply Agreement is void as a result of fraud, economic coercion, breach of fiduciary duties in violation of the New Mexico antitrust statutes, §§ 49-1-1, *et seq.*, N.M.S.A. 1953 and that performance thereunder is not required because of commercial impracticability.

UNC supplied the Panel at that time with documents from the New Mexico court proceedings that it identified as sufficient to "give the Panel an insight into the issues on the merits," noting, however, that it would expect to expand on this presentation "in the light of further developments and additional information gained."

At a subsequent point in the earlier proceedings UNC stated that it must "respectfully decline the Panel's request to formally and definitively state, discuss or try its defenses to GAC's claims at this stage of the proceeding," but added:

> However, since the issues raised by GAC's 1973 Agreement claims here are identical with those adjudged in Case No. 50827 (the New Mexico proceeding) we can state that, if this arbitration should ever proceed as to all such issues, UNC's offensive and defensive claims will be the same as those raised by UNC's First Amended Complaint and reply to GAC's counterclaims in Case No. 50827, by the applicable provisions of the district court's pretrial order in Case No. 50827, and by UNC's Answer Brief in New Mexico Supreme Court No's 11988 and 12052 (consolidated), with one notable addition. As indicated in UNC's Answer Brief (see, for example, pp. 56, 63 and 68), GAC's violations of the New Mexico Antitrust Act are also violations of the Sherman Act (15 U.S.C. §§1 *et seq.*). Such an additional defense will be asserted by UNC if it should ever become necessary to do so.

UNC submitted to the Panel the four documents referred to. They cover in detail UNC's position and evidence on all points except the one noted. The record before the Panel includes at other points statements from UNC about that exception.

The Panel has considered these various UNC documents and statements in its determination of this case. There was no decision in the New Mexico courts on the merits of these issues; the New Mexico District Court entered a default judgment because GAC had not produced Canadian documents relating to the international uranium cartel. The Panel's Partial Award is a de-

termination that the New Mexico court's action is not a bar to these arbitration proceedings.

II

We turn now to a consideration of the merits of the issues in controversy.

As has been stated, this dispute between United Nuclear Corporation and General Atomic Company had its origin in five long term contracts entered into by UNC with electrical utility companies during the period 1966-1971. Those contracts obligated UNC, which was engaged in mining and milling uranium along with other activities, to sell to the following utilities the indicated quantities of milled uranium (U_3O_8), also called "yellow cake."

Date of Contract	Utility	Quantity	Price Per Pound
1966	Commonwealth Edison (Dresden)	1,021,000	$6.30
1967	Illinois & Michigan (Cook I & II)	6,118,000	6.08-7.50
1969	Detroit Edison	3,818,000	7.10
1970	Duke Power Co.	12,100,000	7.20 to 10.25
1971	Commonwealth Edison (LaSalle)	6,356,000	8.66-9.25

Prior to 1970, subsidiaries of Gulf Oil Company were engaged in research and development of a process of producing plutonium from the residual product of nuclear fuel after it is removed from the reactor. (Further development of what was referred to as "mixed oxide fuel" was subsequently suspended, apparently by Presidential order.) Prior to 1970, Gulf subsidiaries were also engaged in the development of a high temperature gas

reactor (HTGR) and were becoming involved in what is known as the "light water reactor" fuel business, the business in which UNC had been engaged.

During the summer of 1970 discussions commenced between Gulf Environmental and Energy Systems (GEES), a Gulf subsidiary, and UNC about the possibility of combining their activities. These negotiations continued, and culminated on July 1, 1971 in the formation of a new corporation, Gulf United Nuclear Fuel Corporation (GUNF), 57% of whose shares were owned by Gulf, and 43% by UNC.

UNC put into the new corporation the five utility agreements and the uranium committed by those agreements as well as its technology, patents, and a contract to supply fuel to the United States Navy. It retained its mining properties and its mining and milling facilities. Gulf put in the facilities of Gulf General Atomic, including a grid manufacturing facility. It also put in a contract which it had to supply 3,200,000 pounds of uranium to a Florida electrical utility, and $8,700,000 in cash. There were commitments for a total of $31,500,000 future loans to GUNF by both parent corporations of which $2,300,000 had been made solely by Gulf, and $5,250,000 by both parent corporations in proportion to their stock ownership before UNC sold its interest in GUNF to Gulf in 1973. GUNF agreed to pay UNC $1,200,000 annually for royalties and $400,000 annualy in rent.

In 1972 and early 1973 it became clear to Gulf and UNC that additional financing, far beyond beyond the initial estimates, would be necessary for GUNF. Several circumstances had contributed to this result: delays in nuclear utility plant construction and operation; additional competition; increased costs of production and the cancellation, a few months after GUNF was formed, of the U.S. Navy contract which had been expected to produce an annual profit of $500,000-$600,000.

Both UNC and Gulf attempted unsuccessfully to interest third parties in GUNF. The parent corporations then turned to the possibility of one of them buying out the other. On November 1, 1972, Gulf offered to turn over to UNC its entire interest in GUNF for one dollar and "an indemnity from United Nuclear for any liabilities Gulf may have under the various fuel contracts with the five utilities." UNC did not accept that proposal. Negotiations continued, and on August 2 and 3, 1973 Gulf and UNC executives met and exchanged proposals and counter-proposals for the solution of GUNF's problems.

Gulf accepted a UNC proposal which contemplated that Gulf would repay, with interest, the loans which UNC had made to GUNF (approximately $1,892,000) and would buy at their book value ($1,308,000), UNC's shares in GUNF. UNC was having problems with its mining schedules because of the delay in the construction and operation of the utility reactors. It was agreed that UNC would continue until the end of 1978 to assume the risk of utility delay, or "slippage" as it was called, and that thereafter Gulf would assume that risk and all further uranium would be delivered on a fixed schedule then established. The net result was that UNC continued to bear the risk of slippage on approximately 8,000,000-9,000,000 pounds of uranium, and as to the balance of about 15,000,000 pounds Gulf would bear the risk of further slippage and would accept from UNC the uranium called for by the utility contracts on a fixed schedule. The fixed schedule uranium was to be delivered and paid for regardless of utility slippages or contract cancellations, and GUNF was free to dispose of it as it saw fit.

After negotiation, Gulf agreed to a price increase upon the uranium UNC was obligated to furnish: 50 cents per pound on the first 10,000,000 pounds, and 25 cents

per pound on the balance, which, when all uranium called for by UNC's contracts had been delivered, would amount to $8,700,000.

The agreement also provided for a mutual release of all claims by each of the parties against the other.

After the agreement between UNC and Gulf had been executed and Gulf had bought all of GUNF's stock, General Atomic Company, a partnership owned by Gulf and Scallop Nuclear, a subsidiary of Royal Dutch Shell, was created. Effective January 1, 1974, all of GUNF's rights and obligations under the utility agreements and the 1973 Supply Agreement were assigned to General Atomic Company.

* * * *

The price of uranium increased sharply in 1973 and 1974. The 1973 OPEC oil embargo dramatically demonstrated the need for development of alternative sources of energy. Approximately 25% of the total oil consumption in this country is utilized in the production of electricity. Electrical utilities ordered 64 new nuclear reactors in 1973 and 1974. Each of those new reactors would eventually require the production of 13 to 14 million pounds of uranium. There also was a change in the pattern of government contracts for the enrichment of uranium, an essential step in the production of nuclear fuel, which is a governmental monopoly. The government adopted a policy of requiring nuclear utilities to enter into long term commitment contracts for enrichment services. The utilities were thus required to supply the government with fixed schedules for enrichment, and in 1974 the government stopped accepting new contracts for the enrichment of uranium.

Other factors were also operating to increase the demand for uranium. In the fall of 1973 Tennessee Valley Authority requested all of the uranium producers to bid on a block of 86 million pounds of uranium. This re-

quest, which apparently was not satisfied, created comment in the trade press as to the adequacy of production facilities in order to meet future demands. Furthermore, during 1973 and 1974 the government policy with respect to the use of recycled material—plutonium and uranium —was changed. The industry had previously anticipated that about 25% of the total demand for fissionable materials to be used in the future would be supplied by recycled material. This prospect was eliminated by the action of the government, which prohibited the use of recycled fuel.

During 1973-74 the United States had placed an embargo upon the importation of foreign uranium. That embargo continued through 1976 and only began to be relaxed in stages in 1977. After the 1973 oil embargo the French announced that they would no longer sell uranium to other nations and thus the uranium producing areas under French control were removed as a source of supply. Australia also announced a moratorium upon supplying uranium outside of Australia and Canada announced a new export policy requiring assurance of an adequate domestic supply before uranium could be exported. Inflation also played a part in the increase in the price of uranium. Moreover, the cost of producing uranium was increasing during 1973 and 1974 both because it was becoming profitable to mine lower grade ore, and because more stringent federal regulations concerning the safety of mining operations increased the cost.

* * * *

The evidence before the Panel establishes UNC's five contracts with the utilities, the 1971 and 1973 supply agreements between UNC and Gulf and the assignment of the 1973 supply agreement to GAC and UNC's nonperformance. This leads to consideration of the various claims UNC advances as justification for its nonperformance. As has been stated, copies of the documents

asserting those claims had previously been furnished to the Panel, and summaries of those claims had been put before the Panel by UNC's attorneys in earlier hearings.

UNC contends that it has no obligation to GAC under the 1973 Supply Agreement. This contention appears to be based upon the language of the assignment clause of that agreement, which states that the agreement inures to the benefit of "the legal representatives and successors" of the immediate parties. Such an interpretation would largely deprive the clause of all meaning because unless the word "successors" includes "assignees", the clause has no significance. The interpretation of the agreement by UNC before litigation was commenced shows that it intended and understood that GAC had succeeded to the rights of Gulf under the 1973 Supply Agreement. That interpretation was demonstrated by UNC's performance as well as by its statements to the Securities Exchange Commission and to its own shareholders and we agree with it.

UNC has also disputed its obligation to deliver uranium on the ground that delivery was not required because a "Limitation of Liability" provision contained in four of its five utility contracts permitted UNC to terminate performance and be liable only for the price the utility was to pay for the uranium. But the testimony of the UNC executives who negotiated those contracts, as well as the testimony of a principal executive of one of the utilities, establishes that the limitation of liability clauses were intended to relate only to potential liability under certain guarantees contained in the contracts. They were not intended to apply to an intentional failure to perform.

UNC's principal contention is that it was absolved from any obligation to GAC under the 1973 Supply Agreement by a series of actions by Gulf involving the establishment of GUNF, its administration as a joint

enterprise, the purchase of UNC's interest and the negotiation of the 1973 Supply Agreement. These actions are alleged to have constituted fraud, breach of Gulf's fiduciary relationship to UNC as a participant in the joint enterprise, and economic coercion. They created a situation, UNC maintains, in which its performance of the supply agreement became commercially impracticable and impossible.

The evidence does not support these claims. It reflects, to the contrary, the negotiation of an agreement between experienced, competent and informed corporate representatives, full participation by both parties in the joint enterprise according to the terms of the agreement, and an arms-length dissolution of that enterprise when it proved unsuccessful. There is no evidence of UNC's being coerced into action it considered unacceptable at the time it was taken or of its inability at any point to perform its commitments. The evidence is rather that when, after two years of performance under the 1973 agreement, the price of uranium rose sharply, UNC decided to break its commitment so that it could sell its uranium at higher price to other purchasers.

Taking up the UNC contentions in more detail, there is first its claim that during 1970-73 Gulf had misrepresented the extent of its interest in and commitment to the light water fuel reactor business in order to harm or destroy UNC, which had been engaged in that business. The testimony before the Panel establishes however, that Gulf was committed to the light water fuel business both as to initial fabrication and as to the reprocessing of nuclear fuel which has already been mentioned. To that end, it had made significant investments. While Gulf was also interested in the high temperature gas reactor HTGR method, it intended to proceed actively with the development of the nuclear fuel business by both methods. UNC's claim to the contrary can not be sustained.

During the discussions that preceded the formation of GUNF, there had been concern about how the new corporation would obtain the uranium which it needed. The problem was a sensitive one, since both UNC and Gulf were producers of uranium and an agreement between them would obviously be subject to strict scrutiny and perhaps to attack under the antitrust laws. The solution ultimately adopted was that the Gulf subsidiary, Gulf Energy and Environmental Systems, (GEES), would negotiate with GUNF for the sale and purchase of uranium. If those two companies reached an agreement with respect to a supply of uranium, UNC would then have an option to supply 40% of that amount under the terms that had been agreed upon. After GUNF was formed, a potential agreement between GEES and GUNF involving the sale of seven million pounds of uranium to GUNF fell through because GUNF was unwilling to buy except on a requirements schedule, while GEES, which would have had to purchase in the open market, on a fixed schedule, was unwilling to sell except on a fixed schedule. Subsequently, in the spring of 1972, an agreement was reached for the sale by GEES and purchase by GUNF of 5,200,000 pounds of uranium. The contention that Gulf deliberately refused to supply GUNF with essential uranium is not sustained by the record.

Another pre-incorporation claim asserted by UNC relates to the handling of GUNF's losses for federal tax purposes. A provision in the Internal Revenue Code limited the length of time during which a loss could be carried forward. It was anticipated that GUNF would lose money for a considerable period, which would or might extend beyond the permissible limitation. In order to take advantage of GUNF's financial losses for federal tax purposes, it was agreed that the operations of GUNF would be included in Gulf's consolidated tax returns. This method contemplated that there would be no taxes billed

to GUNF as long as Gulf could utilize the tax losses in reducing its own income taxes and that when GUNF ultimately became profitable, its income taxes would be paid by Gulf until all of the tax benefit that had accrued to Gulf as a result of GUNF's losses had been restored. Gulf never took advantage of this provision because it had foreign tax credits during the period in question, and the matter became academic because GUNF never showed a profit.

UNC also claims that it was placed in an impossible financial position by Gulf's breach of its fiduciary duties. UNC had been in the business of light water reactors for a much longer period of time than Gulf, and UNC was the primary source of information as to the amount of necessary capitalization. During the pre-incorporation discussions it was represented by UNC and assumed by Gulf that the "negative cash flow" of GUNF would probably not exceed 35 million dollars. Earlier prognostications made by UNC, which were not disclosed to Gulf's representatives during the negotiations, had indicated a much greater need for cash—in the total amount of 70 million dollars or more.

UNC also charges that Gulf had failed to perform its commitments to furnish financing to GUNF. A rather elaborate pattern of loan agreements, some mandatory and some voluntary, had been negotiated and was set out in the incorporation agreement. There was no obligation upon either parent corporation to supply unlimited funds to GUNF. The distinction betwen mandatory and discretionary loans is plain upon the face of the agreement, and the record shows that to the extent that Gulf was required to make loans it performed its obligation.

Moreover, the contention of financial impossibility is rebutted by evidence that establishes UNC's ability to finance other major expenditures during the period that it was refusing to make voluntary loans to GUNF in

proportion to its stock ownership. A consolidation of naval fuel facilities cost about $10,000,000. The acquisition of the remaining 50% interest in Douglas United cost more than $500,000. In October of 1971 UNC acquired the Plateau Coal Mining Company for $10,000,000, and in addition spent more than $1,000,000 for new equipment. Shortly before April 1, 1974, UNC had acquired an enterprise called TSI for $1,400,000. This enterprise was shut down in 1974. And finally, prior to the 1973 Supply Agreement, UNC had owned more than 50% of Uranium Recovery Corporation, and shortly after that agreement it bought the remaining portion for approximately $5,300,000. UNC's contention that it was somehow put in an impossible financial position because Gulf had violated its fiduciary obligations is not supported by the evidence.

The agreement provides that Gulf would have an option to sell to GUNF 50% of the uranium required after January 2, 1974 for use in reload fuel assemblies to be fabricated thereafter pursuant to UNC's five electrical utility contracts. UNC had a similar option with respect to Gulf's obligation to furnish uranium to the Florida Power Company. The possibility of a fixed obligation on the part of Gulf to furnish 50% of the uranium to meet UNC's commitments had been discussed, but had been discarded for antitrust reasons. No such undertaking by Gulf was included in the integrated agreement.

UNC also contends that Gulf entered into the formation of GUNF in order to obtain confidential information from UNC for use by Gulf in pricing HTGR fabrication with the intent of eliminating UNC as a competitor and of gaining control of UNC's business and properties. The testimony before the Panel shows, however, that information about light water fuel pricing was a matter of public knowledge, and in any event, would be of no particular value in pricing HTGR fabricated fuel because

the techniques and processes in the two types of fabrication are entirely different.

UNC also asserts that Gulf did not intend to manage GUNF in full cooperation with UNC, and did not do so. Concerning this claim, the record shows that a large majority of the employees of GUNF were former UNC employees. The president of GUNF was a former Gulf employee, but the executive vice president and three of the other four vice presidents were former UNC employees. These officers had been agreed upon and jointly named in the preincorporation agreement by Gulf and UNC. Mr. David F. Shaw, president of UNC, testified that UNC had more controls, as a minority partner, than are often found in such arrangements, and that the final result of negotiations between Gulf and UNC, as embodied in the agreement, were acceptable to him. During GUNF's existence, pricing policy was worked out by agreement between the two corporations and UNC had an effective veto power over major corporate decisions.

At an earlier stage in these proceedings UNC counsel exhibited to the Panel a memorandum, prepared by an employee of GEES, apparently to create the impression that Gulf had forced certain unfavorable accounting methods on UNC. The testimony and records show however, that this memorandum was in fact rejected by the Gulf officials to whom it was submitted and that no accounting practices whatsoever were forced upon UNC by Gulf. The memorandum in question is entitled to no more weight than is the evidence that UNC minimized the losses it incurred during the GUNF period by accounting practices that were technically legal but did not accord with customary accounting practices.

The Antitrust Claims

It appears that UNC has never, in any of its litigation, directly charged Gulf or GAC with violation of the

federal antitrust laws. UNC did state before the Panel that if it ever became necessary, such a claim would be asserted, but the claim was never actually put forward. At one stage in the earlier precedings [sic] before this Panel, it appeared that such a claim was being made, but after discussion with counsel for both parties, the Panel ruled that the apparent assertion had been inadvertent, and that no federal antitrust claim was before the Panel.

This seemingly unimportant procedural technicality became significant in this case for two reasons: (1) On December 8, 1978 the United States Court of Appeals for the Seventh Circuit held that the attorneys who represent United Nuclear before this Panel, the firm of Bigbee, Stephenson, Carpenter & Crout, were disqualified, because of a conflict of interest from representing UNC in a federal antitrust proceeding against Gulf. (*Westinghouse Electric Corporation* v. *Gulf Oil Corporation, et al.*, 388 F.2d 221.) (2.) UNC repeatedly asserted that the Panel lacked jurisdiction over antitrust claims and that such claims were so intermingled with UNC's assertions of fraud, deceit and violation of fiduciary obligations, that the Panel was without jurisdiction to determine any of the issues in this matter.

Of course the allegation of the existence of an antitrust claim, state or federal, cannot of itself be effective to bar an arbitration. Such a result would render contractual arbitration clauses meaningless, and would frustrate state and federal arbitration statutes. This challenge to jurisdiction, like most others, depends upon the existence of facts. A determination of the existence of those facts is essential to a determination of the legal issue of jurisdiction. If the facts relied upon to show lack of jurisdiction, in this case the existence of conduct which violates the antitrust statutes, do not exist, the attack upon jurisdiction must be denied. We turn, therefore, to an examination of the facts relied upon to sustain the claims of antitrust violations.

In this proceeding UNC asserts that Gulf and GAC engaged in predatory efforts to control New Mexico uranium and also UNC's uranium. It is asserted that Gulf signed a number of contracts in an effort to tie up huge quantities of uranium during the period when the price was low, and to keep uranium out of competition with the foreign cartel of which Gulf was a member. GUNF needed to purchase uranium for its fabrication work and also for its HTGR reactors. But the record before the Panel makes it entirely clear that Gulf, acting through its subsidiary, Gulf Energy and Environmental Services (GEES) and through GUNF as well as GAC, consistently maintained, until June of 1975, a balance between supply and demand that was as close as possible. In June of 1975, utilities began to cancel their contracts to purchase HTGR reactors and the associated uranium from GAC. The balance was then disrupted because GAC was left with the uranium which it was obligated to buy and had intended to deliver with the HTGR reactors.

In addition to the testimony of officers of GAC and its predecessor Gulf-related subsidiaries, a tabulation of offers to supply uranium to those Gulf subsidiaries and to GAC was received in evidence. It shows that during the period from January, 1966 through March of 1975, those companies rejected 58 offers to sell an aggregate total of 288.4 million pounds of uranium. Of course these rejected offers did not relate solely to New Mexico uranium. But uranium is fungible, and an effort to control the supply of uranium within a single state would be economically meaningless.

Another aspect of the antitrust claim asserted by UNC relates to the acquisition by Gulf of uranium deposits in what is known as the Mt. Taylor properties and its allegedly deliberate delay in developing those properties in order to increase the price of uranium. The uranium deposits in the Mt. Taylor properties were apparently of

a higher than average grade of ore, but they also lay at a substantially deeper level than other uranium mines. No uranium had theretofore been mined from so great a depth. The area also contained numerous underground rivers which seriously complicated the mining process. Studies conducted by outside engineers indicated the necessity for substantial expenditures and additional studies before the commercial feasibility of the project could be determined with any degree of certainty. The numerous studies of the engineering situation affords convincing evidence that the project was an extremely difficult one from a physical point of view and an uncertain one from a financial point of view. An internal request for an authorization for the expenditure of corporate funds in connection with the development of Mt. Taylor property dated September 13, 1972 stated:

> "The Mt. Taylor mining project is designed to bring Gulf's east Ambrosia uranium deposits into major production by 1980. These orebodies lie at depths of 3200 to 4200 feet, which is more than twice the dept of any previous sandstone uranium mining. High water flows and high rock temperatures will contribute to make Mt. Taylor an extremely difficult mining situation.
>
> "Before committing to deliver significant amounts of uranium from this deposit we must confirm ore reserves and mining costs by underground development and test mining. This requires an investment on the order of $20,000,000 without having a good fix on the ultimate economics. This pilot investment is of necessity a complete mining plant capable of sustaining development operations in limited production to a toll mill."

The facts do not sustain the claim that Gulf deliberately delayed development of the Mt. Taylor property.

UNC also charges Gulf with violation of its fiduciary duty because it did not disclose its participation in the uranium cartel to UNC during the period from 1972 until September of 1973, while both companies were owners of GUNF. Testimony of officials of UNC establishes, however, that they knew of the cartel, and of the participation of Gulf by the spring of 1972. The 1971 Supply Agreement preceded the first meeting of representatives of the cartel nations. And after UNC knew of the cartel and of Gulf's participation in it, UNC continued to meet its obligations under the 1973 agreement through 1974 and the first half of 1975.

The government of Canada initiated the uranium pricing agreement with the governments of Australia, South Africa and France as a response to actions of the government of the United States which had closed the uranium market in this country to foreign uranium. The pricing agreement provided that it was not to operate in any of the four participating nations, or in the United States. During the existence of the cartel from the date its first price was fixed, August 17, 1972, through 1974 when its last price was fixed in March of that year, the price of uranium in the United States was consistently higher than the cartel prices, with the exception of two months during that period.

It is unlikely that the cartel had any economic effect upon the price of uranium in this country. In its February 20, 1976, letter to its shareholders UNC stated:

> "Published spot prices of uranium have risen from $6 per pound of U3 O8 in early 1973 to $35 per pound in early 1976. We believe that uranium prices now reflect for the first time in the history of the industry a market price determined by a combination of market factors, including costs to replace current reserves, production costs recognizing mining and milling safety and environmental regulations

and requirements, and supply and demand factors."

And again, in a May 10, 1977 letter to its shareholders, UNC stated:

> "There has been much discussion regarding the sharp rise in uranium prices since late 1973. Some contend that present prices are unreasonably high and cannot be sustained. On the contrary, we believe prices reflect uranium supply-demand realities, and production and replacement cost considerations. Today's uranium prices are very comparable to the $8.00 per pound that prevailed in the 1950's, adjusted for cost, inflation, lower average ore grades, and the increased cost and lost productivity in complying with government regulations."

UNC's Annual Report for its fiscal year 1973 stated that it had sold no uranium during that fiscal year because it felt that the price was too low, and that it was to UNC's advantage to retain its uranium rather than to dispose of it at the then prevailing prices. If the cartel had any effect whatsoever on uranium prices in this country, it was not adverse to UNC, a producer and not a consumer of uranium.

We have already determined that none of UNC's assertions of fraud, breach of fiduciary relationship, or economic coercion is well founded in fact. Those claims are also relied upon by UNC to establish antitrust violations, but their factual basis is no stronger in the antitrust context.

GAC has argued and has presented authorities which indicate that the cartel aspect of UNC's antitrust claim is precluded by the Act of State doctrine and also by the federal constitutional provisions which reserve the conduct of foreign affairs to the federal government. We do not find it necessary to discuss these contentions, or to consider other aspects of federal preemption of state

antitrust claims that have been argued by GAC, because the facts do not establish a colorable basis for those claims.

RELEASE

In its rebuttal case, GAC offered evidence concerning identical mutual releases contained in the 1973 Supply Agreement. The terms of the release clause were the subject of particular attention by Gulf's attorneys because during the negotiations that preceded the agreement, one of UNC's representatives referred to a possible claim of breach of confidential relationship on the part of Gulf, and also because a Gulf attorney had been told by a UNC attorney that UNC had been preparing an action against Gulf. As to Gulf and GUNF the release provided:

> "7. As of the Closing Date, UNC shall release and discharge Gulf and the Corporation from all claims, causes of action, debts, obligations, liabilities and duties (except those arising hereunder, those arising under the instruments executed pursuant hereto and those arising under the instruments described in Exhibit C attached hereto) which are owed to UNC by Gulf and/or the Corporation on the Closing Date and in any way arise out of the organization of the Corporation, the business or activities conducted by the Corporation, the management of the Corporation, the Preincorporation Agreement or any instrument executed pursuant to, or in conection with, the Preincorporation Agreement."

This release was the result of negotiations between the executives of the three corporations and their attorneys. We see no reason why it should not be given effect according to its terms.

Commercial Impracticability

As a justification for its breach of the terms of its underlying contracts with the utilities and the 1973 supply agreement, UNC asserts the defense of commercial impracticability. It points to the substantial delays that occurred in the construction and operation of nuclear reactors for which uranium concentrates were to be furnished. It also emphasizes the increases in UNC's costs of production, and it asserts that both of these problems were caused in major part by the acts and omissions of governments and through no fault or neglect of UNC. General inflation is also relied upon.

Under the doctrine of commercial impracticability as expressed in the Uniform Commercial Code, non-delivery is not a breach if performance has been made impracticable by the occurrence of a contingency, the nonoccurrence of which was a basic assumption upon which the contract was made, or by compliance in good faith with any applicable foreign or domestic governmental regulation or order. In such a case the seller is required to notify the buyer seasonably that there will be a delay or non-delivery, and he must allocate his available supply among his customers. The circumstances which have made performance impracticable must have been unforeseen and not within the contemplation of the parties at the time of contracting.

Increased cost alone does not excuse performance in the absence of an unforeseen contingency which alters the essential nature of the performance. Neither a rise nor a collapse of the market is in itself a justification, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover. Lack of foreseeability is the key factor in the application of the doctrine. If a future condition is foreseeable or foreseen, it is the responsibility of the contracting parties to guard against it. The party who invokes

the doctrine cannot himself have been responsible for the condition of which he complains.

When these principles are applied to the present dispute, it is apparent that the essential conditions for application of the doctrine of commercial impracticability do not exist. To the extent that inflation resulted in increased costs of production, the contracts with the utilities (except the Dresden contract with Commonwealth Edison) contained escalation clauses that were the result of arms length negotiations between UNC and each utility. Commonwealth Edison had flatly refused to agree to any escalation clause, and none was incorporated in that contract. In the case of the other contracts, the escalation provisions were the result of negotiations between UNC and each utility, and as Mr. David F. Shaw, President of UNC stated, if the negotiated escalation provisions turned out to be inadequate, "[T]hat's the risk you take."

During the late 1960's revised federal mining legislation and new or revised administrative regulations increased the cost of all mining operations. It also appears, however, that these changes were foreseeable and in fact had been foreseen generally throughout the mining industry. There had been substantial industry opposition to the new safety standards and UNC was aware of these developments.

Construction of a nuclear electrical power plant is a major undertaking in terms of time and money, and the testimony of principal operating officials of UNC shows that they had anticipated substantial delays. In the case of the contracts here involved, some instances of delay in reactor construction resulted in the payment of deferral charges by the utilities.

In the uranium industry mining costs increase as the price of the product increases. This phenomenon appears

to be the result of internal management decisions that the higher price will make it profitable to extract a lower grade of ore. This occurred in the present case. Finally, UNC's statements to the public, to its shareholders and to regulatory agencies remove any doubt as to the adequacy of UNC's supply of uranium to meet its contractual commitments.

We conclude, therefore, that the claim of commercial impracticability is without merit.

Remedies

The remaining question, regarding appropriate remedies, is considered in the framework provided by the Uniform Commercial Code, as well as the Commercial Arbitration Rules of the American Arbitration Association, which provide:

> The Arbitrator may grant any remedy or relief which the Arbitrator deems just and equitable and within the scope of the agreement of the parties, including but not limited to, specific performance of a contract. . . .

The arbitration clause of the 1973 Supply Agreement leaves the Panel broad discretion so far as remedies are concerned.

The five underlying contracts originally entered into between UNC and the four utility companies called for separate deliveries of a total of approximately 29,500,000 pounds of uranium over a period extending from 1967 to 1986. These deliveries were to supply a number of different reactors, some of which were still under construction.

UNC's original contracts involved a variety of delivery commitments. Some were "fixed" commitments calling for the shipment and acceptance of specific amounts of uranium at specified prices on dates certain. Most were

"requirements" commitments with deliveries to be made in accordance with the utilities' needs. All but one of the contracts contained provisions for production cost escalation, as measured by various national indices.

Four deliveries (totaling 1,552,000 pounds) had been made by UNC prior to the establishment of GUNF, and another two (totaling 1,259,000 pounds) were made in 1972 and early 1973. Two additional deliveries (totaling about 1,200,000 pounds) were made by UNC in 1974 and in the first half of 1975, after GAC had succeeded GUNF and prior to UNC's institution of litigation. UNC also made a small delivery directly to one of the utilities in late 1975 and another in 1978.

The remaining commitments under the 1973 Supply Agreement were, then, for the delivery of approximately 24,400,000 pounds of uranium at various times between 1975 and 1986. This is the uranium and these are the delivery commitments for which UNC denies contractual liability and which are included in GAC's claim for damages or other remedy in this arbitration proceeding.

The problems that had afflicted first UNC, and then GUNF, were largely caused by delays (slippages) in the construction and operation of reactors by the utilities. To lessen the impact of future slippages upon its mining operations, UNC had requested, during the negotiations that preceded the execution of the 1973 Supply Agreement, that a substantial amount of uranium previously covered by requirements type contracts be converted into fixed supply contracts. This request was acceded to. All deliveries originally scheduled for the period up to December 31, 1978 were left, by Article IV of the Supply Agreement, on a requirements basis, and they were itemized in Exhibit B of the Supply Agreement. All deliveries originally scheduled for the period following January 1, 1979 on were to be treated, as between the parties to the 1973 agrement, on a fixed supply basis—to

be delivered by UNC and accepted by GAC on the delivery dates originally specified in the contracts between UNC and the utilities regardless of when the utilities called for delivery. The fixed delivery commitments were itemized in Exhibit C of the Supply Agreement. Although Exhibit B does not total the requirements type commitments because of their contingent nature, those commitments covered 24 original deliveries involving what could be approximated as a total of 9,000,000 pounds of uranium. Exhibit C, covering fixed type commitments, itemized 39 delivery dates (on a year-by-year basis from 1979 through 1986) and amounts to a total of 16,167,00 pounds of uranium.

The deliveries made by UNC following the effective date of the 1973 Supply Agreement, totaling approximately 1,000,000 pounds, were against requirement type commitments. There have been no deliveries against fixed type commitments. Of the total, therefore, of some 24,000,000 pounds of uranium which UNC undertook but has failed to deliver or is under present commitment to deliver in the future, approximately one-third (about 8,000,000 pounds) comes under the requirements type commitment, and approximately two thirds (about 16,-000,000 pounds) under the fixed type commitment.

* * * *

In terms of appropriate remedy, UNC's continuing breaches fall into three categories. The first involves the situations that have arisen since August 1975 in which the delivery dates specified in UNC's contracts with the various utilities have approached, the utilities have called for delivery, GAC has demanded delivery by UNC, but UNC has defaulted, and GAC has had to provide the uranium from other sources. Some 3,530,311 pounds of uranium have been involved in these instances.

GAC obtained most of this uranium in the spot market. The spot market prices have ranged, for the par-

ticular month in which deliveries were made by GAC to the utilities, between $35.00 and $43.25. The contract prices at which UNC was committed to supply this uranium to GAC (including base contract prices, escalation clause effect where applicable, and the 50¢-per-pound over-ride agreed to in the Supply Agreement) would have ranged from $7.30 to $12.06 per pound.

It should be noted that during the period in which it defaulted on its commitments to supply this 3,539,311 pounds of uranium at the prices fixed in its original contracts, UNC delivered approximately 9,000,000 pounds of uranium to other purchasers on contracts entered into after 1975, at prices averaging on an annual basis (from 1976 to 1979) from $31.95 to $41.13 per pound.

GAC claims damages for these delivery defaults by UNC in the amount of $132,741,806. This figure was arrived at by (i) computing the contract prices at the delivery dates including the original base price in the UNC/utility contracts, the 50-cent-per pound over-ride added by the 1973 Supply Agreement, and escalation; (ii) ascertaining the publicly reported spot market price for the various delivery dates; (iii) computing the difference between the contract and spot market prices; (iv) multiplying this by the number of pounds of uranium delivery. To the resulting amount of $112,852,043, interest at 10% from the mid-point of the delivery year to June 30, 1980, amounting to $19,889,763 was added, for a total of $132,741,806.

We have considered various alternative measures and have concluded that the use in this computation of generally prevailing and reported spot market prices is appropriate. These prices are regularly quoted in a publication, Nuexco, which has wide trade acceptance. There is another monthly quotation of "average delivered prices," which includes prices received under long term contracts; its resulting average prices are therefore con-

siderably lower than Nuexco's spot price averages. It is clear, however, that an "average delivered price" figure is not relevant to the determination of GAC's costs in obtaining from alternative sources the uranium UNC was committed, but failed, to supply. GAC had to go into the spot market to cover those commitments. The spot market prices quoted by Nuexco and used in GAC's computation of damages are also close to those which UNC received for selling to others the uranium it was committed by contract to deliver to these utility companies.

We have also considered whether the damages here should be computed, alternatively, on the basis of costs actually incurred by GAC in obtaining the uranium delivered to the utilities—rather than on the basis of the spot market index. But to the limited extent that GAC took this uranium out of its own inventory, it had to forego what would otherwise have been its opportunity to sell that uranium on the open market and at current prices. The Nuexco quotations of spot market prices have proved and have been accepted as reliable. Their use in the computation of damages here is appropriate.

The addition of interest to the amount of the damage is in accordance with recognized authority and practice. There is a question however, as to the computation of the interest. GAC describes the 10% figure as no more than a rough averaging of the prime interest rate for the period involved here. A more precise calculation of interest is appropriate and we have recomputed the interest through June 30, 1980 and the total damages as shown in the following table:

1973 Supply Agreement
Missed Deliveries Supplied to Utilities by GAC

Delivery Date	Damages	Interest to 6/30/80*	Total Damages
1/1976	10,911,885	3,437,244	14,349,129
1/1977	12,959,668	3,175,119	16,134,787
4/1978	13,576,733	2,443,812	16,020,545
5/1979	13,784,848	2,050,379	15,835,227
4/1980	10,465,780	431,713	10,897,493
1/1980	16,489,129	1,360,353	17,849,482
1/1978	16,100,000	2,146,581	18,246,581
6/1979	18,564,000	2,564,145	21,128,145
	112,852,043	17,609,346	130,461,389

* 7% for 1975, 1976 and 1977; 8% for 1978; 12¾% for 1979; and 16½% for 1980. Based on average prime rate in each year.

The second category of commitments for which GAC claims money damages includes those with delivery dates prior to June 30, 1980, which have now passed with neither UNC nor GAC making deliveries. A total of 5,433,000 pounds falls within this category. Using the same computational formula that was applied to the missed deliveries by UNC which were in fact delivered by GAC to the utilities, GAC arrives at a damages figure of $149,766,825, to which it has added 10% interest, ($21,690,496) for a total damages figure of $171,457,321. Again we have recomputed the interest at averages of the prime rate for each year, with the result shown in the following table:

1973 Supply Agreement
Damages and Interest
Missed Deliveries Not Supplied to Utilities

	Damages	Interest to 6/30/80*	Total Damages
1975	5,170,550	1,809,693	6,980,243
1976	10,837,750	3,034,570	13,872,320
1977	11,534,600	2,422,266	13,956,866
1978	11,492,250	1,838,760	13,331,010
1979	2,360,820	301,005	2,661,825
	16,224,200	2,068,586	18,292,786
	14,659,860	1,869,132	16,528,992
	13,404,100	1,709,023	15,113,123
	14,803,600	1,877,459	16,681,059
	8,337,000	1,062,968	9,399,968
	13,450,400	1,714,926	15,165,326
1980	6,270,125	258,643	6,528,768
	4,288,460	176,899	4,465,359
	4,788,410	197,522	4,985,932
	2,797,500	115,397	2,912,897
	9,347,200	385,572	9,732,772
	148,766,825	20,842,421	170,609,246

* 7% for 1975, 1976 and 1977; 8% for 1978; 12¾% for 1979; and 16½% for 1980. Based on average prime rate in each year.

The third category involves UNC's commitments to make deliveries on future dates that have not yet arrived. Money damages based on market price at the time of delivery cannot be computed with respect to these deliveries.

Uranium is not unique, but the legal doctrines that formerly restricted the remedy of specific performance to cases involving land or unique chattels are no longer controlling. Both the Uniform Commercial Code and the rules of the American Arbitration Association au-

thorize the use of specific performance in situations which do not involve unique chattels. Specific performance is the obviously appropriate remedy with respect to this third category of deliveries.

The total quantity of uranium involved in this category is 15,028,007 pounds. Of this total amount 2,754,007 pounds are included in requirement type (Exhibit B) commitments under the 1973 Supply Agreement which originally called for deliveries prior to January 1, 1979 but with respect to which there have been slippages due to changes in utility construction or production schedules. Our determination and award is that UNC make delivery of these amounts to GAC at Supply Agreement prices when and as such deliveries are called for by the utilities and by GAC.

The remaining commitments call for the delivery of 12,274,000 pounds. They are fixed type (Exhibit C) commitments under the 1973 Supply Agreement. Our determination and award with respect to these commitments is that UNC make deliveries to GAC upon the delivery dates, in the amounts and upon the terms specified in the Supply Agreement.

The damages and the specific performance which we award are summarized as follows:

AWARD

MONETARY DAMAGES	DAMAGES
Missed Deliveries:	
Which Have Been Delivered To Utilities	$130,461,389
Which Have Not Been Delivered To Utilities	170,690,246
TOTAL DOLLAR DAMAGES ON MISSED DELIVERIES	$301,181,635

SPECIFIC PERFORMANCE

Delivery of Uranium Substantially on the Following Schedule:

Year	Requirement Type Exhibit B (lbs)	Fixed Type Exhibit C (lbs)
1980	530,000	1,262,000
1981	799,007	2,692,000
1982		2,232,000
1983	1,015,000	1,772,000
1984	410,000	1,772,000
1985		1,772,000
1986		772,000
	2,754,007	12,274,000

TOTAL URANIUM DUE 15,028,007 (lbs.)

We note, finally, the "alternative remedy proposal" made by GAC at the end of the hearing before the Panel. This alternative proposal contemplates that all of UNC's delivery commitments except those which GAC has already covered (the 3,530,311 pounds in the first category) be included in a revised schedule extending into the year 1988. A proposed schedule is set out. It leaves the requirements and fixed supply deliveries for the period from mid-1980 through 1986 as they are in the 1973 Supply Agreement but it defers until 1985 to 1988 the delivery of the 5,443,000 pounds that were not supplied to the utilities during the period between 1975 and mid-1980.

This proposal will result in a substantial monetary advantage to UNC if the market price of uranium stays, as it is currently, below the peak levels of 1975 and 1979. The proposed revised schedule spreads deliveries out over the entire period on a relatively even basis. The alternative proposal is as follows:

ALTERNATIVE AWARD

MONETARY DAMAGES

Missed Deliveries:

	DAMAGES
Which Have Been Delivered to Utilities	$130,461,389

SPECIFIC PERFORMANCE:

Delivery of Uranium Substantially on the Following Schedule

Year	Requirement type Exhibit B lbs	Fixed Type Exhibit C lbs	Rescheduled Deliveries
1980	530,000	1,262,000	
1981	779,007	2,692,000	
1982		2,232,000	
1983	1,015,000	1,772,000	
1984	410,000	1,772,000	
1985		1,772,000	385,000
1986		772,000	1,283,000
1987			2,295,500
1988			1,469,500
Total	2,754,007	12,274,000	5,433,000

TOTAL URANIUM DUE 20,461,007 Lbs.

In the event that UNC accepts this proposal, and notifies GAC and Mr. John E. Scrivner, Regional Director of the American Arbitration Association at San Diego, California, of its acceptance on or before October 15, 1980, the Alternative Award may be considered as the Final Award.

The administrative fees, expenses and arbitrator's compensation totaling $127,490.26 shall be borne equally by the parties. Therefore, respondent shall pay to claimant the sum of $36,045.04 for that portion of the fees, expenses and arbitrator's compensation previously advanced

by the claimant to the Association, and respondent shall pay to the American Arbitration Association $793.77 for the balance of the administrative fees, expenses and arbitrator's compensation still due the Association.

/s/ Willard Wirtz
WILLARD WIRTZ

/s/ Walter V. Schaefer
WALTER V. SCHAEFER

Sept. 10, 1980

ATTACHMENT A-1

BIGBEE, STEPHENSON, CARPENTER,
CROUT & OLMSTED

Attorneys at Law

Bokum Building, 132 W. Palace Avenue
Post Office Box 257
Santa Fe, New Mexico 82501

June 5, 1980

John E. Scrivner
Regional Director
American Arbitration Association
530 Broadway
San Diego, California 92101

Re: Arbitration No. 73-10-0078-88

Dear Mr. Scrivner:

UNC continues to protest any and all proceedings in the above referenced arbitration ("the San Diego arbitration"). Among other things, our protest is on the basis that final New Mexico court judgments have declared that GAC has waived any right it had to arbitrate with UNC, that the disputes between UNC and GAC are non-arbitrable, and that the contract under which these proceedings purport to take place is "null, void and unenforceable." These New Mexico judgments, and the constitutional guarantee to full faith and credit of state court judgments, bar the San Diego arbitration.

With the specific intent not to waive the contention that the San Diego arbitration is without jurisdiction and proceeding unlawfully, we feel compelled to bring certain recently discovered factual matters to the attention of the AAA relating to the qualifications and disclosure obligations of the neutral arbitrator, Walter V. Schaefer. We are reliably informed, and believe the following facts to be true:

1. Mr. Schaefer's son-in-law, a lawyer named Chester T. Kamin, is directly opposed to UNC in an Illinois lawsuit. Mr. Kamin, a partner in the Chicago firm of Jenner & Block, is lead counsel for Energy Conversion Devices, Inc. ("ECD"), in a suit involving UNC and ECD relating to an agreement to share scientific technology.

2. Mr. Kamin's client (ECD) is controlled, in whole or in part, by Atlantic Richfield Company, whose Anaconda Co. subsidiary is a direct and substantial competitor of UNC in the uranium business.

3. Mr. Kamin's law firm, Jenner & Block, along with this firm, represented UNC in 1976 in its efforts to prevent arbitration involving Commonwealth Edison, Gulf Oil Corporation and General Atomic Company. This Chicago arbitration, like the San Diego arbitration, involves a dispute over uranium supply.

4. The Jenner & Block associate who performed the majority of the work involved in Jenner & Block's representation for UNC in its effort to prevent arbitration was Henry M. Schaffer. Henry Schaffer left Jenner & Block and joined Rothchild, Barry & Myers, the law firm with which Walter V. Schaefer is associated.

5. Mr. Kamin's firm, Jenner & Block, also represents Rio Algom Corporation in Illinois Federal Court in a lawsuit in which Westinghouse has sued Rio Algom and twenty-eight other defendants (including UNC) for violation of U.S. antitrust laws. Gulf and Rio Algom are the only two domestic companies charged by Westinghouse with hindering discovery procedures by placing cartel documents outside the United States in Canada. Westinghouse is currently seeking default judgment against Rio Algom, Gulf and Gulf Minerals Canada Ltd. —the only three companies against whom default judgment is sought for bad faith discovery failures. Obviously, Jenner & Block and Rio Algom share a common

interest with Gulf and GAC in minimizing the impact of the uranium cartel and discovery failures relating thereto. This uranium cartel and related discovery failures were the direct cause of the default judgment entered against GAC in the New Mexico litigation.

6. In February, 1980, Gulf filed a request in the Westinghouse antitrust litigation in Chicago that a special master be appointed to hear evidence and render an advisory opinion regarding Westinghouse's allegations of bad faith in discovery by Gulf, Rio Algom and others. On April 18, 1980, Gulf submitted an "anonymous note" to the presiding district judge, recommending that Walter V. Schaefer be appointed as the special master to hear evidence on the uranium cartel related discovery failures of Gulf and the client of his son-in-law's firm, Rio Algom. Gulf's secret suggestion that Mr. Schaefer preside over these hearings occurred after the issuance of the arbitrators' Partial Award which declared the New Mexico default judgment, entered against GAC for its bad faith cartel discovery failures, to be a legal nullity.

7. At a meeting of the San Diego arbitration on December 28, 1978, Mr. Schaefer made a disclosure statement to the parties. However, the facts stated in paragraphs numbered 1 through 6 above were not disclosed by Mr. Schaefer on December 28, 1978 or at any other time during the course of the San Diego arbitration.

In light of Section 18 of the Commercial Arbitration Rules of the American Arbitration Association, the foregoing matters should be of particular interest to you.

Very truly yours,

/s/ Donnan Stephenson
DONNAN STEPHENSON

cc: James F. Stiven

ATTACHMENT A-2

[1] AMERICAN ARBITRATION ASSOCIATION
(COMMERCIAL ARBITRATION RULES)

No. 73 10 9978 77

IN THE MATTER OF AN ARBITRATION BETWEEN
GENERAL ATOMIC COMPANY (GAC)

and

UNITED NUCLEAR CORPORATION (UNC)

TRANSCRIPT OF PROCEEDINGS

Monday Morning Session

VOLUME I

June 16, 1980

San Diego, California

Reported by: Frank O. Nelson, CSR #686

* * * *

San Diego, California

June 16, 1980

10:05 A.M.

[3] JUSTICE SCHAEFER: Are you ready to proceed?
THE REPORTER: Yes, sir.
JUSTICE SCHAEFER: Do you have appearances?
THE REPORTER: Yes, sir.

JUSTICE SCHAEFER: Very well. Good morning, gentlemen.

(All respond)

JUSTICE SCHAEFER: Mr. Scrivner advises me that he has some matters he wishes to present, Mr. Scrivner?

MR. SCRIVNER: Yes, Judge Schaefer.

At this time I wish to present to you a letter that was written by Mr. Stephenson and directed to me as the Regional Director of the AAA, dated June 5 and received on June 9, 1980.

This is a copy of that letter.

JUSTICE SCHAEFER: Yes. Now, I have seen a copy of this letter. And I would like to make the following statement concerning it:

None of the matters mentioned in this letter [4] are relevant to my qualifications as an arbitrator, or to my disclosure obligations in this case.

I had no knowledge of any of the matters stated in paragraphs 1 through 6 until after I was advised of the existence of this letter.

One further comment: Mr. Henry Shaffer, who is completely unrelated to me, was, according to the records of the firm with which I am of counsel, Rothschild, Barry and Myers, paid by that firm from September 11, 1977 to October 31, 1978.

That concludes what I have to say with respect to that letter.

Do you have any further statement, Mr. Scrivner?

MR. SCRIVNER: Yes, Judge Schaefer, I have.

In response to that letter, I acknowledged the receipt of it by telephone, and confirmed by letter to both parties, and I asked for the comments from General Atomic Company.

On June 11, 1980, I received this letter, Judge Schaefer, from Mr. Stiven representing GAC, in response to my request.

JUSTICE SCHAEFER: I think it would be wise, for the record, to identify these documents.

The first letter to which Mr. Scrivner . . . .

ATTACHMENT A-3

[1] AMERICAN ARBITRATION ASSOCIATION
(Commercial Arbitration Rules)

No. 73 10 9978 77

IN THE MATTER OF AN ARBITRATION BETWEEN
GENERAL ATOMIC COMPANY (GAC)

and

UNITED NUCLEAR CORPORATION (UNC)

TRANSCRIPT OF PROCEEDINGS

Tuesday Morning Session

VOLUME II

June 17, 1980

San Diego, California

Reported By: William Macauley CSR #311

* * * *

[5] JUSTICE SCHAEFER: That is the American Arbitration Association Exhibit A-AAA-3, yes.

MR. SCRIVNER: There was an inquiry yesterday as to the Association's position, the American Arbitration Association's position, relating to the information furnished by these letters, and the interpretation of various rules of the Commercial Arbitration Rules.

Based on the information furnished by both parties and the American Arbitration Association Exhibits A-AAA-1 and A-AAA-2, letters, and by the statement

of the neutral arbitrator, and in accordance with Section 19 of the rules entitled "Disclosures and Challenge Procedures," the AAA has carefully considered all the information furnished and has determined that any challenge to Judge Schaefer's neutrality in these proceedings is overruled and that the AAA reconfirms Judge Schaefer's appointment as the neutral arbitrator in this matter.

Relating to the section of the rules entitled Section 20, an arbitration in the absence of a party, it is the American Arbitration Association's position that that is a matter to be determined by the arbitrators, as is indicated in Section 53 of the rules which is entitled "Interpretation and . . . .

ATTACHMENT A-4

JULIAN H. LEVI
P. O. Box 1784
Santa Fe, New Mexico 87501

June 30, 1980

Mr. John E. Scrivner
Regional Director
American Arbitration Association
530 Broadway
San Diego, California 92101

Re: United Nuclear Corporation
and General Atomic Company,
AAA #73 10 0078 77

Dear Mr. Scrivner:

Confirming my conversation with you this morning:

I have now seen the transcript of proceedings in the above matter before Arbitrators Schaefer and Wirtz held in San Diego on June 16 and 17, 1980.

I note therein discussion of my resignation which makes this communication necessary.

My resignation was in no sense procured, requested, or suggested by United Nuclear Corporation, its counsel, or anyone acting on its behalf.

The decision to resign was my personal decision. On March 11, 1980, I sustained a cerebral episode which resulted in my hospitalization. At the direction of my physician, I now carry a medical history with me at all times. Under these circumstances, I came to the conclusion that in fairness to the parties, and to my family, I should not continue to act as an arbitrator.

I naturally bitterly resent the aspersions appearing on the record and the now consequent invasion of my privacy.

I appreciate your assurance that you will place this letter on record in the proceedings.

Very truly yours,

/s/ Julian H. Levi
JULIAN H. LEVI

[Entered September 12, 1980]

APPENDIX N

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 11,775

MANDATE

THE STATE OF NEW MEXICO TO THE DISTRICT COURT sitting within and for the County of Santa Fe, GREETING:

WHEREAS, in a certain cause lately pending before you, numbered 50827 on your Civil Docket, wherein United Nuclear Corporation was Plaintiff and General Atomic Company, et al were Defendants by your consideration in that behalf judgment was entered against General Atomic Company; and

WHEREAS, said cause and judgment were afterwards brought into our Supreme Court for review by said Defendant by appeal, whereupon such proceedings were had that on May 7, 1979, an opinion was handed down by said Supreme Court affirming your judgment aforesaid and remanding said cause to you.

NOW, THEREFORE, this cause is heerby remanded to you for such further proceedings therein as may be proper, if any, consistent and in conformity with said opinion and said judgment.

WITNESS, The Honorable Dan Sosa, Jr., Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 18th day of May, 1979.

/s/ [Illegible]

Clerk of the Supreme Court

[SEAL]

APPENDIX O

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
SANTA FE COUNTY

Thursday, November 20, 1980

No. 11988 and 12052 Consolidated

UNITED NUCLEAR CORPORATION,
Plaintiff-Appellee,

vs.

GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,
Defendant-Appellant,

INDIANA AND MICHIGAN ELECTRIC COMPANY,
Defendant-Appellee.

This matter coming on for consideration by the Court upon Motion of Appellant for Stay of Mandate and Enforcement of Judgment and the Court having considered said motion and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that the Motion for stay of mandate and enforcement of judgment be and the same is hereby granted, and the mandate and enforcement of judgment be and the same is hereby stayed.

ATTEST: A TRUE COPY

/s/ [Illegible]
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX P

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
SANTA FE COUNTY

Thursday, October 23, 1980

No. 11,988 and 12,052 (Consolidated)

UNITED NUCLEAR CORPORATION,
Plaintiff-Appellee,

vs.

GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,
Defendant-Appellant,

and

INDIANA AND MICHIGAN ELECTRIC COMPANY,
Defendant-Appellee.

This matter coming on for consideration by the Court upon Motion of Appellant for a Rehearing, and the Court having considered said motion and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court that the Motion of Appellant for rehearing be and the same is hereby denied.

ATTEST: A TRUE COPY

/s/ [Illegible]
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX Q

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

Nos. 11988 and 12052
(Consolidated)

UNITED NUCLEAR CORPORATION,
Plaintiff-Appellee,

v.

GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,
Defendant-Appellant,

INDIANA AND MICHIGAN ELECTRIC COMPANY,
Defendant-Appellee.

APPEAL FROM SANTA FE COUNTY CAUSE NO. 50827

THE HONORABLE EDWIN L. FELTER, Judge

Motion of the Government of Canada as Amicus Curiae for Leave to File Memorandum

---

BERGSON, BORKLAND, MARGOLIS
& ADLER
11 Dupont Circle, N.W.
Washington, D.C. 20036
(202) 462-5930
Attorneys for Amicus Curiae
Government of Canada

The Government of Canada respectfully moves this Court for leave to file, as *amicus curiae*, a copy of a memorandum it recently filed in connection with actions presently pending in the United States District Court for the Northern District of Illinois, In Re Uranium Antitrust Litigation, MDL 342 (N.D. Illinois). The memorandum is entitled "Memorandum of Government of Canada as *Amicus Curiae* on Motions to Impose Sanctions for Failure to Produce Documents Whose Production Is Prohibited by Foreign Law" (hereinafter "Memorandum as *Amicus Curiae*"). The grounds of this motion are as follows:

1. The Government of Canada previously appeared as *amicus curiae* in one of these actions. See Brief of the Government of Canada as *Amicus Curiae*, *General Atomic Co.* v. *Felter*, U.S. Supreme Court, October Term, 1977, Nos. 77-1236, 77-1269, filed April 17, 1978.

2. In its previous filing, the Government of Canada presented its interest in one of these actions and expressed its views on certain principles of international comity and on United States law which it believed required deference to the laws and national policies of Canada.

3. On May 8, 1980, the Government of Canada filed a Memorandum as *Amicus Curiae* in the United States District Court for the Northern District of Illinois in cases involving issues similar to some of those presently before this Court. This memorandum represents the Government of Canada's most recent statement on a number of subjects relating to international comity, act of state and deference to foreign law which are in issue in these consolidated actions.

4. The Government of Canada believes that its "Memorandum as *Amicus Curiae*" would assist the Supreme Court of New Mexico in resolving the issues before it.

For the foregoing reasons, the Government of Canada respectfuly requests that this Court grant leave to file the attached "Memorandum as *Amicus Curiae*", for its consideration in deciding these cases.

Dated: May 23, 1980

Respectfully submitted,

/s/ Lionel Kestenbaum
LIONEL KESTENBAUM

/s/ Barry R. Goldsmith
BARRY R. GOLDSMITH

Attorneys for Amicus Curiae
Government of Canada

APPENDIX R

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
SANTA FE COUNTY

Friday, June 6, 1980

No. 11,988 and No. 12,052

UNITED NUCLEAR CORPORATION,
Plaintiff-Appellee,

vs.

GENERAL ATOMIC COMPANY,
Defendant-Appellant,

and

INDIANA AND MICHIGAN ELECTRIC COMPANY,
Defendant-Appellee.

This matter coming on for consideration by the Court upon motion of General Atomic Company to file supplemental briefs and upon motion of Government of Canada to file amicus curiae brief, and the Court having considered said motions and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that motion of General Atomic Company to file supplemental briefs be and the same is hereby denied.

IT IS FURTHER ORDERED that the motion of Government of Canada to file amicus curiae brief be and the same is hereby denied. This motion was filed after the case has been pending in the Supreme Court for more than one year, and over two years since judgment was entered by the trial court. The comments of the Government of Canada were submitted previously to the trial court, are a part of the record now before this Court, and are being considered by the Court.

/s/ [Illegible]

APPENDIX S

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Nos. 11988 and 12052
(Consolidated)

UNITED NUCLEAR CORPORATION,
Plaintiff-Appellee,

v.

GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,
Defendant-Appellant,

INDIANA AND MICHIGAN ELECTRIC COMPANY,
Defendant-Appellee.

MOTION

Appellant, General Atomic Company ("GAC"), respectfully moves pursuant to Rule 11 of the Rules of Appellate Procedure for Civil Cases for leave to submit for consideration in the appeal a Memorandum of the Canadian Government on the subject of the lack of jurisdiction of American tribunals over claims based upon the existence or activities of the foreign uranium marketing arrangement or cartel. Such Memorandum was filed by the Canadian Government on July 1, 1980 in the United States District Court for the Northern District of Illinois, *In Re Uranium Antitrust Litigation*, Civil Action No. 76 C 3830.

GAC's reasons for requesting this leave to submit are set out in the attached brief supporting this Motion.

Respectfuly submitted,

MONTGOMERY, ANDREWS, & HANNAHS, P.A.
HOWREY & SIMON
MILLER, CASSIDY, LARROCA & LEWIN
ROBERT H. BORK, Esq.
RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By: /s/ John P. Eastham
JOHN P. EASTHAM
Attorneys for Defendant-Appellant
P.O. Box 1888
Albuquerque, New Mexico 87103
Telephone: (505) 765-5900

We hereby certify that we have mailed a copy of the foregoing pleading to opposing counsel of record this 16 day of July, 1980.

APPENDIX T

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
SANTA FE COUNTY

Thursday, August 14, 1980

No. 11,988 & No. 12,052

UNITED NUCLEAR CORPORATION,
Plaintiff-Appellee,

vs.

GENERAL ATOMIC COMPANY,
Defendant-Appellant,

and

INDIANA & MICHIGAN ELECTRIC CO.,
Defendant-Appellee.

This matter coming on for consideration by the Court upon Motion for Leave to Submit Memorandum of Canadian Government, and the Court having considered said motion and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that motion for leave to submit memorandum of Canadian Government be and the same is hereby denied.

ATTEST: A TRUE COPY

/s/ [Illegible]
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX U

[EMBLEM]

Energy, Mines and Resources Canada
Minister

Energie, Mines et Ressources Canada
Ministre

Ottawa, Ontario
K1A OE4

Oct. 19, 1977

Mr. John Bodner, Jr.
Barrister and Solicitor
c/o Howrey and Simon
1730 Pennsylvania Avenue N.W.
Washington, D.C. 20006

Dear Mr. Bodner:

United Nuclear Company v. *General Atomic Company, et al* (No. 50827):
Uranium Information Security Regulations

In your letter of October 13, 1977, you requested on behalf of General Atomic Company, that I give my consent under section 2(a)(ii) of the Uranium Information Security Regulations, SOR 76-644, to the production of documents relating to the uranium marketing arrangement in response to an Order of the District Court for the County of Santa Fe in the State of New Mexico. The documents in question are now in the possession of Gulf Minerals Canada Limited in Canada.

As you may know, the Regulations have recently been changed, although, the effect of the revised Regulations, a copy of which is enclosed, is the same insofar as the documents mentioned above are concerned.

As the production of the documents referred to above would be contrary to the policy of the Government of

Canada in this matter, I hereby refuse your request, I enclose a copy of a statement I made on the subject on October 14, 1977.

In your letter you ask whether compliance with paragraph 1 of the Order of the Court insofar as it provides for the identification of documents located in Canada, would contravene the Uranium Information Security Regulations. I am advised that compliance with the Court's order by Gulf Minerals Canada Limited in the manner described in your letter, would be a violation of the Regulations.

Yours sincerely,

/s/ Alastair Gillespie
ALASTAIR GILLESPIE

[EMBLEM]

Energy, Mines and Resources Canada
Energie, Mines et Ressources Canada

INFORMATION EMR • Ottawa K1A 0E4

NEWS RELEASE

14 October, 1977

PRESS RELEASE BY THE
HONOURABLE ALASTAIR GILLESPIE

The Honourable A. W. Gillespie today said:

"Over the past several weeks, the government has been criticized for actions that it took from 1972-75 to protect the Canadian uranium industry from the consequences of U.S. actions. I want to respond to these criticisms today in order to set the record straight.

The government has indicated on a number of occasions that it viewed the establishment of an international marketing arrangement for uranium in 1972 to be in the national interest. It, therefore, authorized its crown corporations to participate in the arrangement and passed a regulation under the Atomic Energy Control Act requiring the Canadian uranium producers to comply with the pricing and quota provisions which had been agreed upon internationally. The government approved this arrangement in 1972, on the specific understanding that it would not apply to the markets of Canada, Australia, South Africa, France and the United States. It was necessary as a matter of public policy for the government to protect our producing industry from extinction and to do so by helping to stabilize world prices at levels above the cost of production. This policy was defensible in 1972 and it is no less defensible today. We were influenced in this decision by the following considerations:

1) The decision was a direct response to U.S. actions that effectively closed the U.S. market for uranium to Canadian producers. I have outlined the conditions of the uranium market and the nature of the U.S. actions in my statement of June 14, 1977 and in a paper of September 22, 1976. These are attached for reference. The Canadian industry had expanded vigorously through the 1950's, essentially to meet U.S. demands. New mining communities were formed and the American actions threatened the existence of these communities, the jobs of many Canadians, and the existence of the industry itself. The Canadian government protested to the government of the United States on a number of occasions, in order to make that government aware of the impact of its action on Canada and to indicate Canada's view that the U.S. action contravened its international responsibilities under the General Agreement on Tariffs and Trade.

   I am today releasing a number of diplomatic communications between our two governments that indicate the steps taken by Canada to make the U.S. aware of our views on this issue.

2) Through 1970 and 1971 the Canadian government took the lead in organizing discussions with governments of countries that bought uranium from us, apart from the United States, in order to seek ways of ensuring the survival of the Canadian uranium industry. These discussions were not successful.

3) The government has always controlled the export of uranium, under the Atomic Energy Control Act, and continues to do so. After the 1972 policy—requiring minimum prices and specifying volumes of sales to export markets—was agreed, the Minister of Energy, Mines and Resources made a public announcement that he was issuing a Direction to

the Atomic Energy Control Board in this regard. The government of the United States and other governments were also informed, in early 1972, that Canadian companies had met with other producers to discuss such matters as minimum prices and the allocation of markets. The notion that Canadian participation in the marketing arrangements was undertaken in secret is, quite simply, untrue.

I am releasing today, the seven general Directions dealing with prices and quotas that were issued between 1972 and 1975 by the Minister to the AECB. In considering these Directions, the following points are particularly relevant:

1) All the Directions make it explicit that the Canadian and U.S. markets were to be excluded from the agreed marketing arrangements. However, the government continued through this period, as it does now, to regulate and review the export of uranium to all countries to ensure that the terms and conditions of such exports were and are in the public interest.

2) The initial Direction of August 17, 1972 set a minimum price of $5.40 per lb. for uranium delivered in that year. At this time the price on international markets (excluding the U.S.) was estimated to be about $5.00 - $5.50 per lb. The price in the U.S. market, which amounted to about 70% of the world market at the time, was about $6.00 per lb.

3) The last general price Direction, issued in March of 1974, established a minimum price of $8.20 per lb. for delivery in 1974, rising to $12.20 per lb. for delivery in 1978 (or, alternatively, $9.70 per lb. escalated from 1974 for deliveries to 1985). Early in 1974 it was becoming apparent that the uranium

market was beginning to turn around and the Minister's Direction made reference to this trend.

4) By late 1974 it was clear that demand was exceeding supply and the Minister directed the AECB in January of 1975 to disregard the quota restrictions and to bear in mind that the pricing Directions were to be regarded as minimum conditions. In March of 1975, the Minister formally revoked his general pricing Directions to the Board.

5) With the exception of two months in early 1974 prices reported in the U.S. market were never less than the minimum agreed prices. Two charts are attached which indicate the relationship between the U.S. price and the minimum price from 1972-74, and the international selling price of uranium in relation to the last agreed price Direction from 1974 to 1977. It should be noted that the termination in March 1975 of the marketing arrangement —which was said to be artificially increasing the price—did nothing to slow the increase in uranium prices.

In short, the marketing arrangement authorized by the government was temporary. It wad [sic] defensive in nature and directed at protecting the Canadian industry and Canadian communities against restrictive actions by the U.S.

It is against this background that I wish to deal with the questions of the legality of the arrangement and the Uranium Information Security Regulations.

The legality of the arrangement with regard to the Combines Investigation Act was a matter of concern to the government in 1972.

The government was advised that if the arrangement operated so as to limit the volume of exports from Canada or unduly lessen competition in the Canadian market, it could possibly violate the Combines Investigation Act.

Because it was the government's opinion that the arrangement was in the national interest, it passed a Regulation in July 1972 under S.9 of the Atomic Energy Control Act authorizing the AECB, in considering export contracts for uranium, to ensure that prices and quantities as specified in Direction to the Board by the Minister of Energy, Mines and Resources, pursuant to S.7 of that Act, were followed. The effect of this was to provide an exemption from the Combines Investigation Act since the Board was effectively regulating the volume of exports pursuant to an Act of Parliament. The jurisprudence under that Act holds that, insofar as the activities of an industry are effectively regulated they cannot be in violation of the Combines Investigation Act. The Regulation did not operate so as to exempt the producers from any activity which might unduly lessen competition in the domestic market.

It was the government's policy that the domestic market be excluded from the international marketing arrangement. The government has no reason to believe that this arrangement violated the Combines Investigation Act. However, recent allegations that this arrangement did violate the Act have made it clear that the public interest requires this issue to be definitely resolved. It is for this reason, that my colleague, the Minister of Consumer and Corporate Affairs, has directed the Director of Investigation and Research to conduct a formal inquiry under the Combines Investigation Act.

The *Uranium Information Security Regulations* are a separate issue. In essence, they were designed to protect the sovereignty of Canada in the face of extraterritorial application of U.S. legal processes.

In 1975, Westinghouse Electric Corporation announced that it could not honour contractual commitments to provide uranium it had sold at fixed prices. During the period when the U.S. market was closed to foreign producers, Westinghouse not only continued to sell in that

market but competed actively in other foreign markets, selling significant amounts of uranium for future delivery at relatively low prices. In short, it sold uranium it did not have and when prices rose rapidly in 1975 Westinghouse stood to incur losses estimated at over $2 billion if it fulfilled its contractual obligations.

Westinghouse is now being sued by its customers and, in turn, is suing many producing companies including some that participated in the marketing arrangements, alleging that they breached United States anti-trust laws.

A Grand Jury was convened by the U.S. Justice Department to examine whether the international marketing arrangement contravened U.S. anti-trust law and, as a result, parents or subsidiaries of Canadian companies were served with subpoenas demanding that documents in Canada be produced before U.S. courts.

The government finds it objectionable that the actions of Canadian uranium producers, which were required by Canadian law and taken pursuant to Canadian policy, should be called into question by foreign courts.

The Regulations were passed because it became obvious, late in 1976, that the government would have to act to prevent documentation on the marketing arrangements from being released to U.S. courts. Failure to take such action would have placed the government in the untenable position of allowing evidence to be provided to a foreign court for use in the possible prosecution of Canadian nationals for acts that were in accordance with Canadian law and government policy.

The Regulations were drafted on an urgent basis, in response to imminent legal acts by U.S. courts. They have been criticized for unduly restricting the rights and privileges of many Canadians who were not involved in the marketing arrangements and for prohibiting full and frank discussion of the events of that time. The

Prime Minister indicated in the House of Commons in early August that the Regulations would be reviewed.

In the action brought by 6 Opposition MPs in Toronto, the government's position was that the privilege of freedom of speech in Parliament was paramount and that the Regulation did not interfere with that privilege. It further was the government's position that the Regulation did not prevent a member of the public from consulting a solicitor if the true purpose of the consultation was to be advised as to his own legal rights and obligations. The government also informed the Court at that time that it was considering possible amendments to the Regulations.

The Regulations have been reviewed and, as a result, they are being amended, effective today, to substantially narrow their scope. Their application will be limited to information relating to the export from Canada or marketing for use outside Canada of uranium or its derivatives and to persons associated with uranium producers and the federal government. They will not preclude discussion by others of documents that are now in the public domain.

These limited restrictions continue to be necessary to ensure that Canadian sovereignty is adequately protected from the extraterritorial application of U.S. legal processes. Other countries, such as Australia, have enacted legislation designed to deal with threats of interference with their sovereignty by foreign legal processes and the Canadian government may at some point have to consider introducing such legislation. The government's preference, however, in situations where principles of extraterritoriality and sovereignty conflict, is to seek a negotiated solution through diplomatic means. Discussions directed at such a solution are taking place with the United States government and we are optimistic that an accommodation of interests can be found."

[Attachments omitted]

APPENDIX V

[EMBLEM]

DEPARTMENT OF STATE
Washington, D.C. 20520

December 20, 1977

The Honorable
Edwin L. Felter
Post Office Box 2268
Santa Fe, New Mexico 87501

Re: *United Nuclear Corporation*

v.

General Atomic Company, et al.
Santa Fe Docket No. 50827

Dear Judge Felter:

The Government of Canada, through the Canadian Embassy in Washington, D.C., has requested the Department of State to convey to the Court the views of the Government of Canada with respect to certain issues relating to the above-captioned litigation. Copies of the text of two diplomatic notes containing these views are attached.

The Department of State, in transmitting the views of the Canadian Government, takes no position with regard to any of the issues raised in either of the two notes. Transmittal of these documents should not be understood as having implications with respect to the foreign affairs of the United States.

Sincerely,

/s/ John R. Crook
JOHN R. CROOK
Assistant Legal Adviser
for European Affairs

Enclosures: As stated.

[EMBLEM]

CANADIAN EMBASSY

AMBASSADE DU CANADA

No. 620.

The Canadian Embassy presents its compliments to the Department of State and has the honour to refer to the Secretary of State for External Affairs Note No. FLP-177 of August 15 regarding investigations, hearings and actions concerned with international uranium marketing arrangements that are currently being undertaken by the executive, legislative and judicial branches of the United States Government and State overnments.

The Government of Canada understands that the District Court for the County of Sante Fe, New Mexico, has ordered General Atomic Company to identify and produce documents which are in the possession of Gulf Minerals Canada Limited, a related Canadian Company, in Canada. The Government further understands that the Court has taken steps to penalize General Atomic and that General Atomic will be precluded from offering evidence in opposition to such findings of fact, subject to other provisions of the order. The Court issued this order notwithstanding the fact that Canadian regulations prohibit identification or production of these documents except where such release or disclosure is required by or under a law of Canada, and the fact that the Canadian Minister of Energy, Mines and Resources has written to the counsel for General Atomic Company refusing a request to remove and identify the documents. The Supreme Court of Ontario has recently decided that the Minister of Energy, Mines and Resources cannot, in any event, exempt persons from the Canadian regulations.

The Canadian Government is deeply concerned that an order has been issued by a United States court, the

effect of which would be to compel the identification and production of documents in Canada contrary to Canadian law, a result that would be inconsistent with international comity. The Canadian Embassy requests the Department of State to bring the Canadian Government's position, including the views expressed in the Secretary of State for External Affairs Note No. FLP-177 of August 15, to the attention of the United States court in New Mexico.

The Canadian Embassy avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

[SEAL]

Washington, December 9, 1977

Ottawa, August 15, 1977

No. FLP-177

Excellency,

I have the honour to refer to investigations, hearings and actions concerned with international uranium marketing arrangements that are currently being undertaken by the executive, judicial and legislative branches of the United States Government and State Governments and in particular to investigations being conducted by a Department of Justice Grand Jury, the House of Representatives Sub-Committee on Oversight and Investigations and cases related to this matter being heard in courts in the United States including that in the U.S. District Court for the Western District of Pennsylvania in Pittsburgh and that under appeal from the Federal District Court in the Third Judicial District in Salt Lake City.

I have the honour to inform you that the policy of the Canadian Government was to support and participate in international uranium marketing arrangements from 1972 to 1975 to ensure the survival of the Canadian uranium industry which was being damaged by the restrictive uranium trade practices of the United States. Canadian Ministers and officials were acting within their authority in this matter and acted in the way they did to protect Canadian national interests. The Canadian Government finds it objectionable that this Canadian Government policy should be questioned under United States law.

I have the further honour to inform you that the participation of all Canadian uranium producers in these uranium marketing arrangements was a matter of Canadian Government policy to ensure the survival of the industry and, accordingly, to protect the Canadian national interest. Canadian Government policy in this regard was implemented through the Atomic Energy

Control Act and Regulations. These regulations provide, *inter alia*, that no person shall produce, mine, prospect for, refine, use, sell, export, import or possess for any such purpose natural uranium, except in accordance with a license issued by the Atomic Energy Control Board.

I have the honour to request that you communicate this information at your earliest convenience to the United States Government and in particular to the bodies referred to above which are currently considering matters related to the uranium marketing arrangements.

Accept, Excellency, the renewed assurances of my highest consideration.

APPENDIX W

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MDL 342

IN RE URANIUM ANTITRUST LITIGATION

Master File No. 342 A

IN RE TENNESSEE VALLEY AUTHORITY
URANIUM ANTITRUST LITIGATION

No. 76 C 3830

WESTINGHOUSE ELECTRIC CORPORATION,
Plaintiff,

v.

RIO ALGOM LIMITED, *et al.*,
Defendants.

MEMORANDUM OF GOVERNMENT OF CANADA AS *AMICUS CURIAE* ON MOTIONS TO IMPOSE SANCTIONS FOR FAILURE TO PRODUCE DOCUMENTS WHOSE PRODUCTION IS PROHIBITED BY CANADIAN LAW

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Attorneys for *Amicus Curiae*
Government of Canada

May 8, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MDL 342

IN RE URANIUM ANTITRUST LITIGATION

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The Government of Canada respectfully submits this memorandum as *amicus curiae* to present its views on the propriety of imposing the sanctions sought by Westing-

house Electric Corporation ("Westinghouse") and Tennessee Valley Authority ("TVA") against certain defendants in the above entitled actions. The Government of Canada previously appeared as *amicus curiae* before this Court in connection with Westinghouse's and TVA's motions for an order to compel discovery.[1] In its Memorandum Decision of November 7, 1979,[2] the Court adopted a "two-step" approach to the discovery question proposed by Westinghouse. It directed production of foreign documents but deferred consideration of foreign law until an anticipated second step (on motions for sanctions) at which time it would place "the competing interests of the United States and the foreign governments on a plane where the potential moderation of the exercise of their conflicting enforcement jurisdictions can be meaningfully considered.[3] The Government of Canada now requests the Court to consider the compelling interests of international comity and foreign relations, and the interests of Canadian law and sovereignty.

We submit that principles of international comity must be taken into account in determining the pending motions. Under such principles, it would not be proper to take adverse action against any party because of the failure to produce documents or information when its failure is due to the fact that production is prohibited by the law of a friendly foreign country, such as Canada.

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[1] Memorandum of Government of Canada as *Amicus Curiae*, dated May 21, 1979 (hereinafter referred to as "Canada Memorandum").

[2] *In re Uranium Antitrust Litigation*, 480 F.Supp. 1138 (N.D. Ill. 1979).

[3] *Id.* at 1156.

The absence of such documents or information may have an effect upon the assessment of the evidence before the Court in the light of the rules of burden of proof. In this case, the absence of evidence from Canada may be to the disadvantage of plaintiffs on some issues and to the disadvantage of defendants on other issues (*e.g.*, proof of defenses based on foreign law). But these are consequences that flow from the absence of evidence—not from assigning fault or prejudice to any party because of the non-production itself. It would be improper to resolve any issue adverse to a party in this case merely because that party declined to violate a criminal prohibition of the law of Canada and therefore was unable to produce documents subject to this case. Furthermore, before considering the sanctions motions, it is the view of the Canadian Government that the Court should examine the extent of its subject matter jurisdiction. Such a consideraiton should assist in its disposition of the sanctions issues. The Canadian Government intends to seek leave of Court to file an amicus brief on the pending motions of Denison, Gulf and GMCL which raise these jurisdictional questions.

Part I of this memorandum examines Canada's longstanding and comprehensive government regulation of its uranium industry and the importance of the government's steadfast adherence to the Canadian Uranium Information Security Regulations in the overall regulatory scheme.

Part II of this memorandum speaks to the legal authority supporting the position taken by the Government of Canada. United States precedents require the consideration of the interests of foreign law and sovereignty. They also support the proposition that, under United States law, a court may not impose any Rule 37(b) sanction for failing to comply with a discovery order if the reason for non-production is a criminal prohibition under

foreign law rather than willfulness, bad faith or any fault of the party. Imposition of these sanctions, absent the requisite finding of bad faith, would violate established principles of international comity and would very likely have a deleterious effect on the relations between the United States and Canada.

I. CANADA'S URANIUM RESOURCE INDUSTRY AND GOVERNMENT REGULATION

A. The Development of the Canadian Government Policy on the Uranium Industry

The Canadian uranium industry, since its birth in the late 1940's, has developed primarily to supply the export market. Canadian Government policy governing the export of Canadian uranium has evolved over the same period largely in response to changing market circumstances but guided by a set of overall objectives that seek to bring optimum benefit to Canada from the development of its mineral resources. These objectives developed in cooperation with Provincial Governments have been:

1. to ensure adequate supplies for domestic needs;
2. to increase the return to Canadians from exportable surpluses;
3. to strengthen the knowledge base for national decisionmaking;
4. to contribute to orderly world mineral development and marketing;
5. to realize opportunities for further processing;
6. to insure national self-determination in mineral development.

Policy statements which the Canadian Government has made with respect to uranium are attached as Appendix

A. In the early 1950's, special incentives were given to the uranium industry to encourage its vigorous expansion largely to meet United States demand for uranium for its nuclear weapons program. Prior to May 7, 1958, it was the Canadian "Government's policy that Eldorado Mining and Refining Limited [a Crown corporation] be the sole buyer and seller of all uranium produced in Canada".[4] As Eldorado was by legislation an agent of the Canadian Government for all of its purposes, the Government effectively controlled the volume and price at which uranium was exported from Canada. In 1958, the Canadian Government allowed "the private producer to make his own arrangements for the sale of any uranium which Eldorado is satisfied will be surplus to his contract requirements with Eldorado."[5] However, export permits were required from the Atomic Energy Control Board and the Department of Trade and Commerce. The agencies, prior to granting export permits, were required to examine such matters as quantities to be exported and further processing and cooperative agreements with the recipient country with respect to the Peaceful Users of Atomic Energy.

In 1959, the United States announced it would not be exercising options to purchase additional uranium from Canadian producers beyond that already contracted for and the Canadian uranium industry went into a severe decline. The situation for Canadian and other non-U.S. producers of uranium was further aggravated when in the 1960's the United States, to protect its own domestic uranium producers, effectively embargoed the use of foreign uranium by utilities in the United States. This closed 70 percent of the free world market to non-U.S. producers. In order to prevent a complete collapse of its industry, the Canadian Government instituted stockpiling

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[4] See press release dated May 7, 1958 in Appendix A.

[5] *Id.*

programs during the 1960's and early 1970's at a direct cost, excluding interest and other carrying charges, of $130 million (Canadian). One of these stockpiling programs, as announced by the Prime Minister in 1965, was "to avoid any reduction in the current level of employment and production in the industry in Canada".[6]

In 1969, the Canadian Government extended its regulatory control, requiring a specific review of contracts:

> "To protect the national interest in the different circumstances which now face us we will henceforth require that all contracts covering the export of uranium or thorium be examined and approved by the appropriate federal agency before any application for an export permit is considered. The examination will cover all aspects and implications of the contract such as nuclear safeguards, the relationship between contracting parties, reserves, rate of exploitation, domestic requirements, domestic processing facilities, and selling and pricing policy. Approval will not normally be given to contracts of more than ten years duration unless provision is made for renegotiation of price." [7]

When conditions in the uranium market began to deteriorate, the Canadian Government took a number of specific actions. In 1970, it instituted a joint-venture stockpiling agreement with one of its producers to maintain employment and production. Secondly, it attempted to elicit cooperation of consumer countries in maintaining orderly marketing. After this effort failed, the Government in 1972 took the initiative in formulating an international marketing agreement with other producing nations, as described below. The Government also, by regulation, required the A.E.C.B. to ensure, prior to granting

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[6] See Prime Minister's statement of June 3, 1965 in Appendix A.

[7] See Press release dated June 19, 1969 in Appendix A.

export permits, that contracts be in accord with a set of minimum price levels and volumes of sales to be established by Ministerial directive. Between 1972 and 1975, a series of general Ministerial directives were in effect. Since that time, Ministerial directives have been issued with regard to specific transactions after review by an interdepartmental panel.

In 1974, when the market turned upward, there was growing pressure on Canadian producers to meet export opportunities. Therefore, to protect its own domestic requirements, the Canadian Government placed specific time limitations on export approvals while at the same time it continued to require the regulating agencies to examine contracts with regard to price and volumes of sales. The Government noted that export approval would "not normally be given if the pricing conditions for foreign customers were more favourable than those offered to domestic purchasers".[8] Export contract approvals were limited to ten years from the date of signing of the contract and contingent approval was possible for an additional five years. In reiteration of the 1969 policy statement, such contingent approval was not to be given unless there was provision in the contract for renegotiation of price for uranium supplied during the additional five years.

The Canadian Government's control of commercial terms under which uranium is exported applies to all exports, including those for end use in the United States. Prior to 1975, essentially all deliveries of uranium for end use in the United States were sold to the United States Atomic Energy Commission under contracts negotiated during the 1950's; however, in the mid-1970's certain Canadian producers concluded contracts directly with U.S. customers. The terms and conditions of these contracts, including prices and volumes, were subject to

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[8] See Press Release dated September 5, 1974 in Appendix A.

review and approval by the regulating agencies. The Canadian Government continues to regulate and review the export of uranium to all countries to ensure that the terms and conditions of such exports are in the public interest.

B. The Legal Structure of Canadian Government Regulation of the Uranium Industry

Canada has had a comprehensive regulatory system for its uranium resource industry since the birth of the industry in the 1940's. It has exercised its sovereign prerogative to regulate virtually every aspect of this industry, ranging from exploration and mining to export sales, to ensure compliance with Government pricing policy.

Canadian legislation governing atomic energy was first enacted on August 31, 1946 as *The Atomic Energy Control Act, 1946*, S.C. 1946, c.37, which was subsequently amended and consolidated as the *Atomic Energy Control Act*, R.S.C. 1970, c.A-19 ("Act"). This legislation was in force throughout the period during which the uranium marketing arrangement was in effect.

The Act established the Atomic Energy Control Board for the purpose of the Act. The preamble of the Act stated that "it is essential in the national interest to make provision for the control and supervision of the development, application and use of atomic energy". Pursuant to section 9 of the Act, the Board was empowered as follows:

> "9. The Board may with the approval of the Governor-in-Council make regulations
>
> . . .
>
> (b) regulating the production, import, export, transportation, refining, possession, ownership, use or sale of pre-

scribed substances and any other things that in the opinion of the Board may be used for the production, use or application of atomic energy;"

On July 29, 1972, a regulation was passed pursuant to the Act under which the Board was not to issue any export permit unless the contract price and quantities were in accord with the Ministerial price directive specified in the public interest (see subsection 201(2) of the Regulations below).

As noted above, a number of general directives setting out, *inter alia*, price and quota criteria were issued by the Minister of Energy, Mines and Resources to the Board and were in effect during the period July 19, 1972 to March 27, 1975, inclusive. On March 27, 1975, the Minister of Energy, Mines and Resources, by letter to the Board, cancelled all existing directives. Subsequent directives have been adopted by the Minister on a transaction-by-transaction basis.

The authority of the Minister of Energy, Mines and Resources to direct the Board in the aforementioned manner was pursuant to section 7 of the Act, which reads as follows:

> "7. The Board shall comply with any general or special Direction given by the Minister with reference to the carrying out of its purposes".

Section 201 of the Atomic Energy Control Regulations approved by P.C. 1960-348 as amended by P.C. 1972-1719 provided:

> "201(1). No person shall import into Canada or export from Canada any prescribed equipment for the time being specified by order for the purposes of this section or any prescribed substance without first producing to the Collector of Customs and Excise at the proposed port of entry or exit an import

or export permit from the Board, and no Collector of Customs and Excise shall permit any such prescribed equipment or any prescribed substance

(a) to be released or delivery to an importer in Canada; or

(b) to be exported from Canada,

unless the appropriate permit from the Board is produced to him.

(2) A permit to export prescribed substances shall not be granted unless the Board is satisfied that the prices stipulated for, and the quantities of, the prescribed substance proposed to be exported meet such criteria, if any, respecting price levels and quantities as may be specified in the public interest in a direction given to the Board by the Minister.

Section 201 was repealed by the Atomic Energy Control Regulations approved by P.C. 1974-1195 and the following substituted therefor:

5(1) No person shall

(a) import or export any prescribed substance, except in accordance with a license issued pursuant to section 7.

7(4) Subject to subsection (5), the Board or a designated officer may issue a license for any purpose referred to in section 5 upon receipt of a written application from the person requiring such license.

(5) A license to export a prescribed substance shall not be issued unless the Board is satisfied that the price and quantity of the prescribed substance in respect of which the application referred to in subsection (4) is made meet the criteria, if any, respecting price levels and quantities that may be specified in the public interest in a direction given to the Board by the Minister.

The authority of the Minister of Energy, Mines and Resources to issue directives pursuant to subsection 7(5) of the Regulations (formerly 201(2)) and section 7 of the Act was attacked in *Re AGIP S.P.A. and Atomic Energy Control Board et al.*, 87 D.L.R. (3d) (1978) (Federal Court of Appeal). The facts in that case were that the Minister had directed the Board that an export license not be issued to a foreign purchaser of uranium oxide from a Canadian producer if the sales were to be at a price less than $42.00 (Canadian) per pound. In addition, the Board directed that the payment by the purchaser to the Canadian producer of $42.00 per pound be a condition precedent to the issuance of an export license. Judicial review was sought pursuant to section 28 of the *Federal Court Act*, R.S.C. 1970, c.10 (2nd Supp.), which gives the Federal Court of Appeal jurisdiction to review decisions of a federal board, commission or tribunal "other than a decision of an administrative nature not required by law to be made on a judicial or quasi-judicial basis".

The Court quashed the section 28 application on the grounds that the decision of the Minister and the Board were administrative and, therefore, the Court had no jurisdiction. Le Dain, J. stated at page 535:

> "The decisions of the Atomic Energy Control Board in the exercise of its licensing function are made subject to direct ministerial control by means of directions expressive of governmental policy. This shows the very special position of the Board in this field: it is not exercising a truly independent adjudicative function on issues that viewed as a whole lend themselves to a judicial or quasi-judicial process. The reservation of the ministerial power to make directions upon the basis of the recommendations of a review panel composed of representatives of the departments concerned, as well as the Board,

indicates that the issues in the final analysis are seen to be complex ones of national policy, involving in some cases questions of security, over which the Government acting in its executive capacity must retain ultimate control".

In addition to this far-reaching system of Government control under the Act over the export of uranium, the *Export and Imports Permits Act*, R.S.C. 1970, c.E-17 has also been in force. Under section 7 of that Act, the Minister of Industry, Trade and Commerce has the following power:

> "7. The Minister may issue to any resident of Canada applying therefore a permit to export goods included in an Export Control List or to a Country included in Area Control List, in such quantity and of such quality, by such persons, to such places or persons and subject to such other terms and conditions as are described in the permit or in the regulations".

Uranium, in either raw or treated form, including compounds, was placed on the Export Control List. There was, therefore, at all times relevant to the uranium marketing arrangement, legislation in force in Canada providing a second source of government control over uranium exports.

C. Canadian Government's Reaction to Restrictive United States' Policies and Regulations—The Establishment of and Participation in the International Marketing Arrangement

The long history of close Canadian Government involvement in and regulation of the uranium resource industry clearly establishes the degree to which the Government regarded the industry as vital to Canadian interests and the importance it consequently attached to industry compliance with Government policy respecting uranium marketing. For these reasons, the Canadian

Government, acting in cooperation with governments of other producing countries, initiated and later participated in an international uranium marketing arrangement. The Canadian Government took this initiative and secured compliance of Canadian producers with the terms of the arrangement because it was convinced that preservation of a viable uranium producing industry was essential to the national interest. Statements made by Canadian government officials reflect this involvement and these interests.[9]

The purpose of the international marketing arrangements was to allocate the meager non-U.S. demand among the non-U.S. producers, and to stabilize prices for a transitional period.[10] The arrangement did not apply to sales to consumers in participating countries and in the United States.

Until the marketing arrangements were discontinued in in 1975, the Canadian Government through govern-

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[9] See Attachments A-D to Canada Memorandum dated May 21, 1979. Attachment A is an October 14, 1977 press release issued by Hon. A. W. Gillespie, the Canadian Minister of Energy, Mines and Resources at that time, attaching (*inter alia*) the text of the Regulations and various pertinent diplomatic communications; Attachment B is a March 15, 1978 Diplomatic Note (No. 116) from Canadian Embassy to U.S. Department of State; Attachment C is Canada's *amicus curiae* brief filed on April 17, 1978, in the United States Supreme Court in connection with *General Atomic Co.* v. *Felter*, 436 U.S. 904 (1978); Attachment D is a November 8, 1978 Diplomatic Note (No. ECP-25) from Hon. Donald Jamieson, Canadian Secretary of State for External Affairs, to Mr. Thomas Enders, the United States Ambassador to Canada.

[10] The Canadian Government, which had previously objected through diplomatic channels to the United States' foreclosure of its uranium market, promptly advised the American government of the initiation of the marketing arrangement. See Canada Memorandum dated May 21, 1979 at Att. A, Note No. 210, August 4, 1969; Aide-Memoire of July 24, 1970; Note 359, December 3, 1971; February 14, 1972 letter from H. C. Armstrong to A. S. Freidman.

ment-owned corporations was an active participant in meetings and decisions of the marketing group. Officials of the Ministry of Energy, Mines and Resources, acting through these corporations, took an active role in all phases of the arrangement and attended meetings of producers from the various countries and of Canadian producers. In addition, Canadian Government officials made every effort to secure and did secure the participation of all Canadian uranium producers.

During the 1972-75 period, the participation of all Canadian uranium producers in the International marketing arrangement was a matter of firm Government policy. Compliance with this policy was secured primarily through the Atomic Energy Control Act and regulations promulgated thereunder. This policy, which was clearly expressed in the public statements of Canadian officials, was defensive in nature and was considered to be in the vital national interest of Canada.

Contrary to Westinghouse's assertions that the Canadian Government merely "espoused the interests of the cartel participants as their own",[11] it is clear that the Government's establishment of and participation in the marketing arrangement was based on its view that the arrangement was essential to Canada's national interests. This is shown, for example, by the statement of Alastair Gillespie, Minister of Energy, Mines and Resources, in 1977:

> The government has indicated on a number of occasions that it viewed the establishment of an international marketing arrangement for uranium in 1972 to be in the national interest. It, therefore,

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[11] Westinghouse Memorandum in Support of Motion for Sanctions Against Defendants Which Have Not Complied with the Court's Order for Production of "Foreign Documents", dated March 3, 1980 (hereinafter referred to as "Westinghouse Mem.") at 42.

authorized its crown corporations to participate in the arrangement and passed a regulation under the Atomic Energy Control Act requiring the Canadian uranium producers to comply with the pricing and quota provisions which had been agreed upon internationally . . . It was necessary as a matter of public policy for the government to protect our producing industry from extinction and to do so by helping to stabilize world prices at levels above the cost of production. This policy was defensible in 1972 and it is no less defensible today. Canada Memorandum dated May 21, 1979 at Att. A, Statement dated October 14, 1977.

D. *The Canadian Uranium Information Security Regulations*

Canada considered it contrary to her sovereign prerogatives for foreign tribunals to question the propriety or legality of the actions of Canadian uranium producers that were taken outside the United States and were required by Canadian law or taken in implementation of long standing Canadian Government policy. This was especially so given the degree to which the government regulated the Canadian uranium resource industry and its importance to the national well-being. Accordingly, when it became clear that documents located in Canada bearing on the international uranium marketing arrangements and the Government's participation therein might be removed to the United States in response to legal proceedings there, the Canadian Government promulgated the Uranium Information Security Regulations, on September 23, 1976.

The Regulations were enacted to serve a vital national interest—the preservation of Canada's past and future sovereign authority to secure compliance with its own laws and policies respecting a vital Canadian natural

resource. The Government's authority would be undermined if the multinational corporations that play a major role in the Canadian industrial and resource sectors were to be more responsive in their Canadian activities to U.S. laws than to Canadian law and policy. The Regulations cannot be considered apart from the history of direct government participation in the marketing arrangement and the Canadian Government's role as industry regulator over the past 30 years. As we have previously stated, the Regulations were not procured by members of the uranium industry and were not adopted to protect the commercial interests of those companies.[12] They were enacted to carry out matters of government interest and policy.

In the recent Canadian Supreme Court opinion on letters rogatory in these cases, Chief Justice Laskin recognized that the Canadian governmental interests here "transcended" the Regulations. *Gulf Oil Corp.* v. *Gulf Canada Ltd.*, Supreme Court of Canada (Slip Op. March 18, 1980) at 17. (See Appendix B) In deciding whether the considerations of comity were sufficient to overcome the prohibitions against disclosure in the Regulations, the Chief Justice pointed out:

> the Uranium Information Security Regulations . . . were merely an expression of the Government's public policy and it is the policy rather than the regulations that, in this case, is a factor in the Court's exercise of its discretion. *Id.*

The Supreme Court recognized that Canada's interest in promulgating the Regulations stemmed not only from the fact that it viewed the extraterritorial application of United States antitrust law as a threat to its sovereign interests, but also that the Canadian Government itself was the implementer of, and a party to the arrangement:

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[12] See Canada Memorandum dated May 21, 1979 at 5.

> [W]here the Government is party to the arrangements out of which the documents, whose disclosure is sought, emerge, and it has promoted the arrangements as a facet of its energy policy in which the marketing of uranium is a central feature, I fail to see how public policy can be ignored in the interests of comity towards a foreign court, as if the policy was essentially a reflection of private considerations without any public, governmental interest. Again, the voluminous documents . . . are not simply private documents drawn up as a result of discussions and negotiations in which the Government of Canada played no part but, concededly, reflect an input by representatives of the Government. *Id.* at 22-23.

E. *Canadian Policy on Enforcement of the Regulations*

It has been the continuing and oft-stated policy of the Canadian Government to enforce the Uranium Information Security Regulations. In the period from the promulgation of the Regulations to date, numerous requests for waivers and approaches to ministers and officials of the Government of Canada have been made, seeking various forms of relief from the Regulations so that documents and information could be produced in U.S. court proceedings.[13] These efforts and the Government's responses were summed up in a Diplomatic Note from Donald Jamieson, Secretary of State for External Affairs of Canada, to Thomas Enders, U.S. Ambassador to Canada (No. ECP-25, November 8, 1978), in which it was stated:

> A number of parties to various civil actions before United States courts have made urgent and vigorous

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[13] Requests from Denison Mines Ltd., Noranda Mines Ltd., Gulf Minerals Canada Ltd., Gulf Oil Corp. and Rio Algom Corp. have all been denied. These requests were variously made by letter or at meetings attended by government officials.

requests to the Canadian Government for a waiver from the Regulations, amendment to the Regulations or any other action on the part of the Canadian Government which would enable them to comply with the orders of the U.S. courts. The Government has refused each of these requests and has continued to prevent production of the documents and information in question because it considers disclosure of documents to which the Uranium Information Security Regulations apply to be inimical to the national interest of Canada. The Canadian Government has also declined to release certain documents and information for the same reason when requested to do so by the Government of the United States for use in proceedings before a U.S. Grand Jury. Canada Memorandum dated May 21, 1979 at Att. D, Diplomatic Note ECP-25.

Since that time, further requests for relief have also been consistently denied. After this Court's Order of November 7, 1979, Acting Prime Minister Baker turned down a request by various defendants that the Government of Canada change its policy with regard to the Regulations and allow the production of the protected documents.[14]

In addition, efforts were made to obtain the documents covered by the Regulations by application to the courts of Canada. An application by Westinghouse to enforce letters rogatory and obtain such documents, issued by the United States District Court for the Eastern District of Virginia and the Court of Common Pleas for Allegheny County, were rejected by the Ontario High Court

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[14] Letters from Acting Prime Minister Baker to P.S.A. Lamek, John R. Light, Keith F. Bode and Jerry McAfee, dated December 21, 1979. Copies of these letters are included herein as Appendix C.

in 1977; an appeal was taken but eventually was dropped.[15]

Subsequent to this Court's Order of November 7, 1979, Gulf and Gulf Minerals Canada Ltd. ("GMCL") made application to the Supreme Court of Canada to enforce letters rogatory issued out of this Court and out of the United States District Court for the Southern District of California, seeking to obtain documents and information in the possession of GMCL and Gulf Canada Ltd. which were covered by the Regulations. The Attorney General of Canada intervened in the proceedings and opposed their enforcement, submitting, *inter alia*, that the Regulations reflected Canadian Government policy and it would be a wrongful exercise of discretion for the Supreme Court of Canada to ignore the policy by enforcing the letters rogatory. The Supreme Court of Canada recognized that "[w]ere it not for the *Regulations*, they [GMCL and Gulf Canada Ltd.] were quite prepared to make disclosure and thus to assist their parent company in the two actions." *Gulf Oil Corp.* v. *Gulf Canada Ltd.*, Supreme Court of Canada (Slip Op. March 18, 1980) at 6, Appendix B. The Court dismissed the application, in light of public policy considerations articulated by the Attorney General of Canada. *Id.* at 23-24.[16] Thus, despite repeated attempts by various persons to obtain documents and information covered by the Regulations, the Government of Canada has steadfastly

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[15] *Re Westinghouse Electric Corp. and Duquesne Light Co., et al.*, 78 D.L.R. (3d (Ont. High Ct. 1977). The Attorney General of Canada appeared in opposition to this application.

[16] The two Canadian court decisions which have considered the validity of the Regulations have upheld them. *Re Clark et al. and Attorney General*, 81 D.L.R. (3d) (Ont. High Ct. 1977); *Re Westinghouse Electric Corp. and Duquesne Light Co., et al.*, 78 D.L.R. (3d) (Ont. High Ct. 1977). The Supreme Court of Canada did not reach this issue.

held to its insistence that disclosing these materials would be inimical to the national interest. Canadian courts have supported this position.[17]

II. LEGAL PRINCIPLES APPLICABLE TO THE IMPOSITION OF SANCTIONS

A. *Comity and International Law*

Principles of international comity preclude adverse action against any party because of such party's compliance with the prohibition of Canadian law and the consequent inability to produce documents and information in this litigation.

The principles of comity have long been recognized under United States law to be applicable in cases such as this involving conflicts between the discovery procedures of United States courts and the laws of foreign sovereigns. *See, e.g., In Re Westinghouse Electric Corp. Uranium Contracts Litigation*, 563 F.2d 992, 998-99 (10th Cir. 1977); *Application of Chase Manhattan Bank*, 297 F.2d 611, 613 (2d Cir. 1962); *cf. Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423 (1964) (international law principles as part of American law). These principles under U.S. law require, in appropriate cases, that U.S. courts defer to foreign law because of considerations of international comity.

Canadian courts, like U.S. courts, recognize the propriety of deferring to foreign law in accordance with principles of comity. For example, in *Frischke* v. *Royal Bank of Canada*, 1977 17 O.R.2d 388 (Ontario C.A.), the Ontario Court of Appeals reversed a trial court's order directing a third party to contravene Panamanian

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[17] After the Supreme Court of Canada denied Gulf and GMCL's applications to enforce letters rogatory, counsel for various defendants again met with Canadian Government officials and requested that the Government change its policy with respect to the Regulations; again, the Government adhered to its prior position.

law and provide certain information. In reversing, the court cited analogous United States cases and declared:

> An Ontario court would not order a person here to break our laws; we should not make an order that would require someone to compel another person in that person's jurisdiction to break the laws of that State. We reject those laws. The principle is well recognized. 17 O.R.2d at 399.[18]

The United States Supreme Court in *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958) (hereinafter referred to as "*Societe*") held that a prohibition of foreign law provides a justification for not producing documents in response to requests for discovery. Such a prohibition gives rise to a party's "inability" to produce documents, and sanctions are not to be imposed if non-production "has been due to inability, and not to willfulness, bad faith or any fault" . . . of the non-producing party. *Id.* at 212. In *Societe*, as is the case here, "[i]t is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for non-production, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign." *Id.* at 211.

3. *The Balancing Process*

The starting point in the task suggested by this Court of "framing the competing interests" [19] of the United States and Canada is to recognize that the Uranium Information Security Regulations were promulgated in furtherance of a national policy of vital concern to Can-

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[18] The Ontario court cited *United States* v. *First National City Bank*, 396 F.2d 897 (2d Cir. 1968) and *Application of Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962). It observed that Canadian courts would defer to foreign law except in "cases of very special circumstances." 17 O.R.2d at 299.

[19] *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1156 (N.D. Ill. 1979).

ada. These Regulations prohibit the disclosure of a category of documents or their contents which are located in Canada and relate to uranium exporting or marketing. Canadian law provides for substantial criminal penalties in the event this prohibition is violated.[20] Canada insists that the prohibitions contained in these Regulations be obeyed by all persons subject to them.[21]

These Regulations are entitled to the full respect of this Court.

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves. *Underhill* v. *Hernandez*, 169 U.S. 250, 252 (1897).

See also Timberlane Lumber Co. v. *Bank of America, N.T. & S.A.*, 549 F.2d 597, 607 (9th Cir. 1976) (act of state doctrine requires a court not "to challenge the sovereignty of another nation, the wisdom of its policy, or the integrity and motivations of its actions.").[22] As

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[20] The maximum penalty for violation of the Regulations is imprisonment for up to five years and a fine not to exceed ten thousand dollars. Atomic Energy Control Act, R.S.C. 1970, c. A-19, Section 19(1).

[21] This is demonstrated by the repeated and firm refusal of the Canadian Government to grant relief from the Regulations, pp. 19-22 *supra*. Westinghouse's statement that it may be "justified in supposing that foreign authorities may not insist on inflicting punishment" were the Regulations violated (Westinghouse Mem. at 39) is clearly contrary to Canadian law and policy.

[22] International comity thus dictates that the Regulations be accepted as a sovereign act of Canada, and that inquiry into the factors in the Canadian political process that led to the promulga-

we have stated, these Regulations were put into place to protect Canada's sovereign prerogatives and its present and future ability to organize sectors of its economy as it sees fit.

These Regulations were deferred to in the case of *In Re Westinghouse Electric Corp. Uranium Contracts Litigation*, 563 F.2d 992 (10th Cir. 1977) (hereinafter referred to as "Westinghouse Uranium Contracts"), where the Tenth Circuit observed:

> The records . . . are physically located in Canada. Such being the case, it would not seem unreasonable that the Canadian Government should have something to say about how those records will be made available to interested outsiders. That Canada has a legitimate "national interest" in this matter is

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tion of these Regulations is inappropriate. In addition, apart from this rule of comity, it is clear that no claim could properly be advanced under U.S. antitrust law based upon private parties' requests for governmental action. The United States Department of Justice recently considered the question whether concerted action by foreign corporations to cause a foreign government to impose restraints which might affect United States commerce can be actionable under the antitrust laws. In the Department's "Antitrust Guide for International Operations" dated January 26, 1977, CCH Trade Reg. (February 1, 1977) at 61-62, the Department states that it considered the *Noerr-Pennington* doctrine to apply to foreign political processes:

> The only question here, therefore, is whether the *Noerr-Pennington* doctrine applies to efforts to cause a foreign government to impose restraints on U.S. commerce. While the *Noerr* case turns in part on U.S. domestic constitutional considerations, the Department does not consider it to be limited to the domestic area. . . . Accordingly, we conclude that A's activity, joining B, C, and D in the making of a recommendation that the government of X [to] exclude another U.S. competitor, does not violate U.S. antitrust law. . . . Under *Noerr-Pennington*, the collective exercise of the right of political expression is protected, even where its goal is highly anticompetitive. *Id.* at 62.

> perhaps best illustrated by reading the opinion of the Ontario Supreme Court, wherein it . . . determined that the nondisclosure regulations were in furtherance of a national interest in controlling and supervising atomic energy. 563 F.2d at 998.

In *Westinghouse Uranium Contracts*, the Tenth Circuit reversed the district court's contempt and sanctions order against Rio Algom Corporation for failing to produce documents subject to the Regulations on the ground that the lower court failed to engage in a "balancing" of governmental interests before imposing sanctions. The Court of Appeals framed the issue to be "the accommodation of the principles of the law of the forum with the concepts of due process and international comity," *id.* at 997 (citing *Arthur Anderson & Co.* v. *Finesilver*, 546 F.2d 338, 341 (10th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977)). Guidance as to the factors to be considered in the "balancing" process, the Court said, is found in Section 40 of the Restatement (Second) of the Foreign Relations Law of the United States, which provides as follows:

> § 40. Limitations on Exercise of Enforcement Jurisdiction
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> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as
>
> (a) vital national interests of each of the states,
>
> (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,

(c) the extent to which the required conduct is to take place in the territory of the other state,

(d) the nationality of the person, and

(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

Thus, balancing these factors is not only a task which the court is obliged to undertake in determining whether to exercise jurisdiction over these actions (*see, e.g., Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976)), but it also is an essential aspect of its consideration of the motions for sanctions (*Westinghouse Uranium Contracts, supra*). Consideration of the factors to be weighed in such a balancing process suggests that denial of the motions for sanctions is required:

(1) *Vital national interests of each of the states*

In ordering defendants to produce foreign documents, this Court specifically reserved its full consideration of prior communications from foreign governments to the U.S. State Department until the sanctions stage. *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1149 (N.D. Ill. 1979). The Government of Canada respectfully submits that this Court should consider the "vital national interests" of Canada, as expressed in these diplomatic communications in deciding the questions before it. *Westinghouse Uranium Contracts*, 563 F.2d at 998-99.

The Canadian Government, on a number of occasions, has expressed the seriousness with which it views the imposition of sanctions on persons because of their adherence to the foreign law of Canada. An order of the United States judiciary which would require behavior in Canada violative of the Regulations would be viewed

as disruptive of the friendly foreign relations between the two governments. For example, in an August 15, 1977 Diplomatic Note regarding another uranium related litigation, the Acting Canadian Secretary of State for External Affairs expressed Canada's concern over the issuance of an order imposing penalties for a corporation's failure to turn over documents in violation of the Regulations:

> The Canadian Government is deeply concerned that an Order has been issued by a U.S.A. court, the effect of which would be to compel the production of documents from Canada contrary to Canadian law, a result that would be inconsistent with international comity. Att. A, Diplomatic Note No. FLP-178 dated August 15, 1977.

In this same connection, a Diplomatic Note to the U.S. Department of State on March 15, 1978, stated that the Government of Canada would be "deeply concerned" if United States courts were to seek to induce behaviour in Canada in contravention of the Regulations. Canada Memorandum at Att. B, Diplomatic Note (No. 116) dated March 15, 1978.

At this sanctions stage of the discovery proceeding, the question of "the competing interests of the United States and foreign governments" becomes particularly important. *See In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1156 (N.D. Ill. 1979). The Government of Canada's interest in the sanctions question in these cases was set forth in a November 8, 1978 Diplomatic Note in which Hon. D. Jamieson, Canada's Secretary of State for External Affairs, stated:

> The Government of Canada wishes to state its serious objection to the imposition of any sanction by the judicial branch of the United States Government for failure to produce documents or to disclose

> information located in Canada where such production or disclosure would require a person or corporation in Canada to perform an act or omission in Canada which is prohibited by the Uranium Information Security Regulations or any other law of Canada. The threat or imposition of any such sanction would have the appearance of an attempt to induce the performance in Canada of acts which are prohibited in Canada and of attaching liability for acts performed in Canada in accordance with Canadian law and the publicly declared policy of the Canadian Government. Such procedure would be inconsistent with generally accepted principles of international law, with the manner in which the Governments of Canada and the United States carry on their mutual relations and with the spirit of those relations. Canada Memorandum at Att. D, Diplomatic Note No. ECP-25.

Canada's concern, as expressed above, extends "to the imposition of any sanction" where the only basis for doing so rests in a party's good faith adherence to Canadian law.

United States courts have recognized Canada's vital national interest in the Regulations. For example, the Tenth Circuit, in *Westinghouse Uranium Contracts*, recognized that Canada's national interest in obtaining adherence to the Regulations superseded the United States' interest in providing a private party in an antitrust action with discovery. *Westinghouse Uranium Contracts*, 563 F.2d at 998-99.[23]

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[23] This is particularly true where, as here, the Department of Justice has previously investigated the matter in dispute and completed a prosecution on behalf of the American government. It should be noted that the Department of Justice was able to bring its investigation to conclusion without having access to documents covered by the Regulations.

Furthermore, it should be noted that, in the prior motions before this Court to compel production of documents, Westinghouse argued that the absence of a protest from the United States Executive Branch is a factor to be considered with regard to comity. Significantly, on March 18, 1980, the Department of Justice presented to the Seventh Circuit a communication of the Department of State stressing the substantial interests of Canada and other foreign governments in this case, and the need to take into account the views of such governments and the considerations of comity. This communication reads in pertinent part:

> The fact is that the foreign governments concerned have substantial interest not only in this litigation, but also in certain broader issues which it raises. There has been a considerable high-level diplomatic correspondence over the matter for several years. These concerns stem from a fundamental difference of opinion between these government [sic] and the United States Government over the propriety of the exercise of United States jurisdiction, including but not limited to United States antitrust jurisdiction, over persons of foreign nationality for actions taken outside the territorial jurisdiction of the United States. In this case the foreign governments have further concerns arising out of their involvement in developing and/or implementing official policies concerning uranium marketing which they deemed consistent with their national interest and which are now being challenged, not through diplomatic channels, but through private damage litigation in a U.S. court.
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> * * * *
>
> It is our belief that in future proceedings in this and other cases, the courts should give due consideration to the views of interested foreign governments and take into account appropriate considerations of

comity where there is possible conflict between the laws or policies of nation states. (Letter from Robert B. Owen, Legal Adviser, Department of State, to John H. Shenefield, Associate Attorney General, Department of Justice, dated March 17, 1980, attached hereto as Appendix D.)

(2) *The extent and the nature of the hardship that inconsistent enforcement action would impose upon the person*

"It is hardly debatable that fear of criminal sanctions constitutes a weighty excuse for non-production". *Societe*, 357 U.S. at 211. Persons convicted of violating the Canadian Regulations face imprisonment for up to five years and a maximum fine of ten thousand dollars.[24]

(3) *The extent to which the required conduct is to take place in the territory of the other state*

As was the case in *Westinghouse Uranium Contracts*, the documents in issue are physically located in Canada and "[s]uch being the case, it would not seem unreasonable that the Canadian Government should have something to say about how these records will be made available to interested outsiders." *Westinghouse Uranium Contracts*, 563 F.2d at 998.

(4) *The nationality of the person*

The corporations that have possession and control of the documents in question are Canadian corporations whose officers and directors are subject to Canadian law.

(5) *The extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state*

Compliance with the Court's discovery orders cannot be expected since it has been the firm policy of the Can-

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[24] Atomic Energy Control Act, R.S.C. 1970, c. A-19, Section 19(1).

adian Government to require strict adherence to its laws and regulations in the nuclear industry.

In conclusion, these factors as they are applied to the situation before the Court, show that deference to Canadian law is the proper course. *See, e.g., Westinghouse Contracts Litigation*, 563 F.2d 992 (10th Cir. 1977) (law of Canada); *Application of Chase Manhattan Bank*, 297 F.2d 611, 613 (2d Cir. 1962) (law of Panama); *Federal Maritime Commission* v. *DeSmedt*, 268 F. Supp. 972, 974, 975 (S.D.N.Y. 1967) (law of Great Britain and Canada); *Ings* v. *Ferguson*, 282 F.2d 149, 152, 153 (2d Cir. 1960) (law of Canada); *First National City Bank of N.Y.* v. *Internal Revenue Service*, 271 F.2d 616, 619 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960) (law of Panama); *United States* v. *First National City Bank*, 396 F.2d 897, 901-905 (2d Cir. 1968) (law of Germany).

C. *"Punitive" and "Remedial" Sanctions*

Westinghouse and TVA take the position that the sanction of default can somehow be distinguished from all other sanctions available under Rule 37(b). They suggest that sanctions for failure to make discovery can be divided into two categories—"punitive" and "remedial", and it is only with respect to the "punitive" sanction of default that a prior showing of bad faith or fault on the part of the non-producing party must be made. They argue that a showing of willful noncompliance, bad faith or fault is unnecessary for the other sanctions, and that such sanctions may be imposed for non-production which is due to a party's good faith compliance with a criminal prohibition of foreign law. We submit that this argument is untenable as a matter of international comity and as a matter of United States law.

First, as regards the principles of comity, the imposition of any sanction based on a party's good faith

compliance with Canadian law would be offensive regardless of the nature of the sanction. This applies, of course, to sanctions which are virtually equivalent to resolution of the case on the merits—by entering findings on critical issues, precluding the introduction of evidence and similar actions. The Government of Canada is particularly concerned with the way in which proposed sanctions would foreclose issues of foreign law and comity, ignore the sovereign interests of Canada, and contradict specific representations and policies of the Government of Canada.

For example, Westinghouse's Proposed Findings of Fact 18-19 purport to deal directly with the role of the Canadian Government in the international marketing arrangement. These findings are offensive in that they completely ignore and contradict official statements of the Government of Canada regarding the events in issue, including statements to this Court and to the Executive Branch. It would be improper to enter a finding, for example, that the Canadian Government "made clear at all relevant times prior to 1976 that it was the producers, and not the governments, which ran the cartel", contrary to fact and to the Canadian Government's official statements, which are to be given deference.[25] Similarly, precluding parties from pursuing the merits of defenses of act of state and sovereign compulsion would flout established principles of foreign relations law.[26]

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[25] As a matter of comity, it is not appropriate to question a foreign government's motives or to look behind a foreign government's policy decisions. *See, e.g., Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597, 607 (9th Cir. 1976). See pp. 25-26 *supra.*

[26] The moving parties go so far as to suggest that the sanctions they seek against defendants in this litigation are necessary to "help to deter foreign governments from further enactments of this sort" (Westinghouse Mem. at 69). It would be plainly incon-

Second, the Government of Canada submits that under United States law, no such distinction among so-called "punitive" and "remedial" sanctions is made. As we have stated, *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958) holds that, because of principles of international comity and of due process, there must be a showing of bad faith or fault before any sanctions may be imposed; and compliance with foreign law provides justification (*supra*, p. 24).[27] *Societe* and other cases also clearly show that this proposition applies to all sanctions under Rule 37(b).

Westinghouse appears to argue that, absent a showing of bad faith on the part of the party from whom discovery is sought, *Societe* precludes dismissal (which was involved in that case) or a default judgment, but authorizes all other sanctions under Rule 37(b)—such as striking defenses, preclusion of evidence and entry of findings of fact, etc., no matter how stringent they are and no matter what the practical effect of imposing the sanctions would be on a party's ability to litigate the case. (See Westinghouse Mem. at 16-17.) Review of the Supreme Court's decision in *Societe* does not disclose any basis for this suggestion. While the Court makes reference to the district court's "wide discretion" in connection with how to proceed on remand, *id.* at 213, the statement is not, in any way, related to sanctions, entry of findings or any other action regarding the merits of the case to be taken as a result of the non-

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sistent with principles of comity to consider using judicial sanctions in a private case as a means of influencing the legislative prerogatives and executive acts of foreign nations.

[27] The Government of Canada notes that the parties against whom the motions for sanctions are pending have made many efforts to obtain the documents and information covered by the Regulations, both before and after this Court's Order of November 7, 1979 compelling discovery. See discussion at pp. 19-22 *supra*.

production itself. The Supreme Court was there referring to how the district court would proceed to resolve the case:

> It [the district court] may desire to afford the Government additional opportunity to challenge petitioner's good faith. It may wish to explore plans looking towards fuller compliance. Or it may decide to commence at once trial on the merits. *Id.* at 213.

This does not support the conclusion that any judicial action is to be taken adverse to a party failing to make production because of foreign law, if "bad faith" is excluded.[28]

Nor is a different view to be inferred from the Court's observation that, "[t]his is not to say that [the non-producing party] will profit through its inability to tender the records called for",[29] a passage cited by Westinghouse and TVA.[30] Immediately thereafter, the Court entered into a discussion of the burden of proof on the non-producing party in that case, and the extent to which it would be handicapped by the absence of evidence. *Id.* at 212-13. Similarly, the opinion thereafter referred to the possibility that the lower court may be justified "in drawing inferences unfavorable to petitioner as to particular events." *Id.* at 213. This

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[28] This point is highlighted by the Court's reference in the remand discussion to a possible further challenge to the non-producing party's good faith. The Court had earlier indicated that the record supported a finding that the non-production "had been due to inability [because of foreign law] and not to willfulness, bad faith or any fault of the [party]." *Id.* at 212. The opportunity to reopen the issue of "good faith" was plainly intended to underline the critical nature of the "bad faith" exception to the rule against sanctions for nondisclosure due to foreign law.

[29] *Id.* at 212.

[30] See Westinghouse Mem. at 16; Brief of Plaintiff Tennessee Valley Authority in Support of Rule 37(b) Motion for Sanctions for Failure to Provide Discovery at 23.

referred to inferences that were said possibly to follow from the state of the record, in the absence of the documents sought. There is no suggestion of any inferences to be drawn from the non-production itself. Indeed, the Court then stated that "these problems go to the adequacy of petitioner's proof and should not on the record preclude petitioner from being able to contest on the merits." *Id.*

In sum, in *Societe* the Supreme Court did not invite district courts to consider sanctions for failure to make discovery, when due to a criminal prohibition of foreign law. It recognized that there were consequences which might follow from the absence of documents because of the prohibition of foreign law. But these were due to the application of the burden of proof in the light of resulting gaps in the record. The decision in *Societe* stresses the constitutional right of a litigant to try the merits of his claim and fully supports an approach under which, in the absence of bad faith, the district courts should accept the absence of documents due to foreign law, as analogous to other missing evidence. The courts are not entitled to make any decision on the merits, or to resolve any issue adverse to any party, on the basis of its failure to respond to discovery when that failure is due to a criminal prohibition of foreign law.

Westinghouse cites *Dorsey* v. *Academy Moving & Storage, Inc.*, 423 F.2d 858 (5th Cir. 1970) for the proposition that bad faith or fault is only relevant with respect to the sanction of default (Westinghouse Mem. at 14-15). Contrary to Westinghouse's assertion, *Dorsey* holds that where a party's failure to make discovery is due to its inability to do so, not to bad faith, the imposition of sanctions (including those other than default) is improper. *Id.* at 860, 862. The particular sanctions imposed by the lower court in *Dorsey* were the striking of a portion of plaintiff's claim and an order precluding the plaintiff from introducing certain evidence at trial.

Dorsey did not involve an issue of foreign law, but the decision plainly rejects any distinction between default and other sanctions. Judge Wisdom recited plaintiff's "diligent and extensive efforts" to comply with the discovery request and held that absent a finding by the district court that the failure to supply the requested information "was willful, in bad faith, or that the plaintiff had not made a diligent effort to obtain such information", the striking of a portion of her claim was improper. *Id.* at 860. The court went on to say:

> The sanctions available under Rule 37(b) for such conduct are predicated upon the presence of such factors as willful disobedience, gross indifference to the right of the adverse party, deliberate callousness, or gross negligence. The sanctions are not predicated upon a party's failure to satisfy fully the requirements of a production order when the failure "was due to inability fostered neither by its own conduct nor by circumstances within its control". [Citing *Societe*]

Dorsey, 423 F.2d at 860. Similarly, the lower court's preclusion order was vacated on the basis of a holding that the plaintiff's inability to produce the documents "was not caused by her own misconduct," *id.* at 862, and that the lower court had not made a requisite determination that "the plaintiff's failure to produce the requested documents was either willful or in bad faith." *Id.* at 861.[31]

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[31] *See also Cine Forty-Second St. Theatre Corp.* v. *Allied Artists Picture Corp.*, 602 F.2d 1062, (2d Cir. 1979), in which an order of preclusion tantamount to dismissal was held proper only after court found answers to interrogatories to be either willful or so grossly negligent as to justify order; *Wilson* v. *Volkswagen of America, Inc.*, 561 F.2d 494 (4th Cir. 1977), *cert. denied*, 434 U.S. 1020 (1978) (cited in Westinghouse Mem. at 17), in which the Fourth Circuit recognized that the "bad faith" requirement of *Societe* applied not only to the sanction of default, but to other less severe sanctions as well:

[Continued on page 487a]

Accordingly, principles of comity and of U.S. law under Rule 37 lead to the same conclusion—that sanctions may not be imposed for a party's failure to produce documents when this is due to the party's inability to do so, including as in this case because of criminal prohibition of foreign law.

Conclusion

It is the view of the Government of Canada that the issue of this Court's subject matter jurisdiction should be decided prior to its consideration of the sanctions question. As to sanctions, however, we respectfully urge this Court, for the foregoing reasons, to honor the accepted principles of international comity and to decline to impose sanctions upon any party for failing to produce documents when such failure is due to compliance with Canadian law.

Respectfully submitted,

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May 8, 1980

[31] [Continued]

The power to impose sanctions under Rule 37(b) for failure, after court order in discovery proceedings to produce documents is discretionary with the Trial Court. It is not, however, a discretion without bounds or limits but one to be exercised discreetly and never "when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of [the non-complying party]." 561 F.2d at 503.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Memorandum of Government of Canada as *Amicus Curiae* on Motions to Impose Sanctions for Failure to Produce Documents Whose Production is Prohibited by Canadian Law was sent by first-class mail, postage prepaid, to all counsel of record on May 8, 1980.

/s/ Barry R. Goldsmith

[Attachments Omitted]

APPENDIX X

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MDL 342

IN RE URANIUM ANTITRUST LITIGATION

Master File No. 342 A

IN RE TENNESSEE VALLEY AUTHORITY
URANIUM ANTITRUST LITIGATION

No. 76 C 3830

WESTINGHOUSE ELECTRIC CORPORATION,
Plaintiff,

v.

RIO ALGOM LIMITED, *et al.*,
Defendants.

MEMORANDUM OF GOVERNMENT OF CANADA AS *AMICUS CURIAE* ON MOTIONS FOR SUMMARY JUDGMENT ON JURISDICTIONAL GROUNDS

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MDL 342

IN RE TENNESSEE VALLEY AUTHORITY
URANIUM ANTITRUST LITIGATION

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RIO ALGOM LIMITED, *et al.*,
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MEMORANDUM OF GOVERNMENT OF CANADA AS *AMICUS CURIAE* ON MOTIONS FOR SUMMARY JUDGMENT ON JURISDICTIONAL GROUNDS

The Government of Canada respectfully submits this memorandum as *amicus curiae* to present its views on the pending motions for summary judgment on jurisdictional grounds filed by Gulf Oil Corp. and Gulf Minerals Canada Limited and by Denison Mines Limited and Denison Mines (U.S.) Inc.

The exercise of antitrust jurisdiction in this case is a subject of great concern to the Government of Canada. In its view, it is objectionable that actions of the Canadian uranium industry, taken outside the United States

in accordance with Canadian law and in response to declared national policy, should give rise to civil or criminal liability in the United States. The Government cannot accept a situation in which its ability to ensure compliance by the Canadian private sector with its laws and industrial policies would be undermined. We file this memorandum to present to the Court a statement of Canada's position, including the factors which bear upon the jurisdictional issues from the standpoint of principles of international comity recognized by United States law.

This memorandum, and those previously filed in this proceeding,[1] represent the duly considered official position of the Government of Canada. The statements describing Canadian laws and policies and the factual background of such laws and policies were specifically approved and authorized at the Ministerial level by the Canadian Government.

The interest of the Government of Canada has been presented to the Court in prior filings as an *amicus curiae* in connection with the motions of plaintiffs Westinghouse Electric Corp. and Tennessee Valley Authority to compel production of documents whose production was prohibited by Canadian law, and their motions to impose sanctions for failure to produce such documents. In that connection, we discussed the interests of Canadian law and sovereignty and the requirements of international comity. We pointed out that principles of comity must be taken

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[1] Memorandum of Government of Canada as *Amicus Curiae*, dated May 21, 1979 on the motions of Westinghouse and TVA to compel production (hereinafter referred to as "Canada Memorandum on Document Production"); Memorandum of Government of Canada as *Amicus Curiae*, dated May 8, 1980 on the motions for sanctions (hereinafter referred to as "Canada Memorandum on Sanctions"); Memorandum of the Government of Canada as *Amicus Curiae*, dated November 6, 1979, filed in the Court of Appeals on appeals from the entry of default judgment.

into account in determining whether to exercise jurisdiction over these actions,[2] the issue now before the Court.

In the prior filings, we also described in some detail, on the basis of official Government statements, the development of the Canadian Government's policy regarding its uranium industry; the legal structure formulated for its comprehensive and pervasive regulation of that industry; and the Canadian Government's initiative and participation in an international uranium marketing arrangement.[3] These facts are, of course, highly material to the Court's consideration of its jurisdiction.

We submit that a balancing of relevant factors supports the position that antitrust jurisdiction should not be exercised over activities undertaken by Canadian companies outside the United States and within the scope of Canadian Government laws and policies regarding Canadian export trade in uranium. In particular, we refer to laws and policies governing prices, quantities and other terms of export transactions, and participation in the international marketing arrangement from 1972 to 1975.

Part I of this Memorandum briefly recapitulates the factual background of Canada's regulatory laws and policies.

Part II discusses the impact of international comity, as recognized by U.S. law, on the exercise of jurisdiction in these cases. It considers various factors which bear upon the exercise of antitrust jurisdiction in foreign commerce. It shows that jurisdiction should not be exercised with respect to conduct undertaken by Canadian

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[2] Canada Memorandum on Sanctions at 28.

[3] Canada Memorandum on Sanctions at 4-22, and Appendices A-B; *see also* Canada Memorandum on Document Production at 2-8, and Appendices A-D.

companies outside the United States pursuant to Canadian laws and policies for development and control of its uranium resources. We also point out that comity requires that Canada's statements as to the character and scope of its regulatory laws and policies be accepted.

I. THE SCOPE OF CANADA'S POLICIES ON URANIUM EXPORT MARKETING

From the outset Canada has exercised comprehensive and pervasive regulatory authority over the uranium industry, including exports. The industry was vigorously promoted, largely in response to United States' needs, and became a substantial factor in Canada's overall resource development program. By 1959, uranium was Canada's fourth largest export by value and employed 13,600 people. The industry then entered a period of disruption and decline because of United States' actions in limiting, then closing, its domestic market to Canadian product.

The Canadian Government undertook various actions designed to stabilize and salvage this important sector of its economy. It initiated a stockpile program. It strengthened its detailed control over export contracts. Beginning in 1969 the Government used its regulatory authority to establish and carry out a system for review of all aspects of export contracts, including pricing policy and sales terms.[4] Since 1972, Ministerial directions under the Atomic Energy Control Act dealing with price, quantity and other terms have been issued to the Atomic Energy Control Board, which reviews and regulates all uranium export contracts.[5]

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[4] Canada Memorandum on Sanctions at 7-8, 10-14.

[5] Canada Memorandum on Sanctions at 7-8, 14-16; Canada Memorandum on Document Production at 3-4.

As another remedial step, the Government attempted to initiate an arrangement between uranium producing and consuming nations in 1971. When that failed, it thereafter took the initiative with other producing nations in formulating and implementing an international marketing arrangement to stabilize the industry during a transitional period. This arrangement was in effect for about three years, 1972 to 1975. It governed sales for ultimate use in countries other than the participating countries or the United States.[6]

The marketing arrangement was implemented in Canada in part through general Ministerial directions, issued to the Atomic Energy Control Board, which prescribed minimum prices and allocated quantities for export sales to end-users in countries other than the participating countries and the United States. Prices and terms for other export sales covered by the arrangement, such as sales to manufacturers for resale and use in countries other than the participating countries or the United States, were regulated by the Atomic Energy Control Board on a transaction-by-transaction basis.

The Canadian Government directed its Government-owned corporations to participate in the meetings of the international marketing arrangement which discussed and arrived at proposed prices and quantities and other terms for export sales.[7] The Government also secured

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[6] Canada Memorandum on Sanctions at 7-9. The general directions issued by the Minister of Energy, Mines and Resources are set forth in the Canada Memorandum on Document Production, Att. A, Directions dated August 17, 1972, May 22, 1972, August 31, 1973, October 30, 1973, and March 6, 1974. The countries participating in the marketing arrangement were Canada, Australia, South Africa and France.

[7] Canada Memorandum on Sanctions at 7-9, 16. The officials of the Canadian Crown corporations, Uranium Canada Limited and Eldorado Nuclear Limited, were acting as agents of the Govern-

the participation of all Canadian uranium producers. This was essentially done by declaring it to be Government policy to participate in the arrangement, specifying that the prices and quantities would be enforced by Government action, and making clear that company participation was expected in the national interest.[8] Given the range of existing tools at its disposal to ensure compliance of Canadian companies with its policies, including denial of export permits, it was not necessary for the Canadian Government to seek new legislation specifically requiring companies to participate in the uranium marketing arrangement.

While Canada's participation in an international arrangement terminated in 1975, its regulatory control over the price and other terms of export contracts has continued. The Control Board continues to regulate

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ment. The Uranium Canada officials were also officials of the Ministry of Energy, Mines and Resources and reported directly to the Government through their Ministry.

[8] Plaintiffs' citation of statements of Government officials that companies were not forced to participate are taken out of context (see TVA Memorandum at 21; Westinghouse Memorandum at 39-41). A complete reading of the text of Prime Minister Trudeau's statement in the House of Commons on October 25, 1977, in the correct order, indicates that it does not support the position for which it was quoted by Westinghouse. These statements reflected the position that the Canadian Government policy was a rational program undertaken in the interests of the national economy and of the industry and that it was so recognized by others concerned (e.g., Statement of Prime Minister Trudeau, Westinghouse Memorandum, App. 3). These statements support the gravity of the Canadian interest.

Further, references by Westinghouse to a message from Mr. MacDonald, the Minister of Energy, Mines and Resources, to the Canadian Uranium Producers on April 14, 1972 pre-dated the decision of the Canadian Government to issue regulations and directions under the Atomic Energy Control Act. See Canada Memorandum on Document production, Att. A, Statement by Hon. A. W. Gillespie at 6.

contracts on a transaction-by-transaction basis after review by an interdepartmental panel.[9]

Canadian laws and policies which have been described in official statements clearly applied to transactions by Canadian uranium producing companies with parties such as the plaintiffs in these cases during the period in question. The prices and terms of all uranium export sales from Canada (including those to the U.S.A.) have been reviewed and regulated by the Canadian Government. For example, sales to TVA were subject to Government review and control; indeed, this Court has previously been provided with evidence of the Government's rejection of a proposed sale contract with TVA.[10] All export contracts were reviewed to assure conformity with Government policies, including obtaining the optimum return for Canada's uranium resources.[11]

II. INTERNATIONAL COMITY AND THE BALANCING OF INTERESTS IN EXERCISE OF ANTITRUST JURISDICTION

The principles of comity in international law recognized by the U.S. law must be taken into account whenever it is proposed that a domestic law be given extraterritorial effect, by applying it to conduct subject to the authority of other countries where conflicting policies may govern. Comity requires that due deference must be given to interests and policies of other countries.

The need for such deference and accommodation to foreign interests and policies has been a particularly acute problem in the antitrust field over the years. Ex-

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[9] Canada Memorandum on Sanctions at 8, 9, 12-13.

[10] Canada Memorandum on Document Production, Att. A, letter of Donald S. MacDonald, March 27, 1975.

[11] *Id.*; Canada Memorandum on Sanctions at 4-5, 8-9.

pansive assertion of U.S. antitrust jurisdiction has led to resistance and friction abroad.[12] It has been viewed as an interference with other countries' laws and policies being properly applied to conduct within their territories. The consequence has been a growing acknowledgment of the need to balance the U.S. interest in antitrust enforcement against the interests of other countries, before antitrust jurisdiction can properly be exercised. "When foreign nations are involved, . . . it is unwise to ignore the fact that foreign policy, reciprocity, comity, and limitations of judicial power are considerations that should have a bearing on the decision to exercise or decline jurisdiction." [13]

A. *The Governing Authorities*

The balancing approach was embodied in the Restatement of Foreign Relations Law (Second), previously cited to this Court.[14] Section 40 of the Restatement declares as follows:

> § 40. Limitations on the Exercise of Enforcement Jurisdiction
>
> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, the possible modera-

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[12] *See, e.g.*, Comment, "Defenses to Actions Against Foreign States Under the United States Antitrust Laws", 20 Harv. Int'l L.J. 583, 619-21 (1979); Maechling, *Uncle Sam's Long Arm*, 63 A.B.A.J. 372 (1977); Restatement of Foreign Relations Law (Second), § 40, Reporters' Notes.

[13] *See Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1296 (3d Cir. 1979).

[14] Canada Memorandum on Sanctions at 25-34; Canada Memorandum on Document Production at 13.

tion of the exercise of its own enforcement jurisdiction, in the light of such factors as

(a) vital national interests of the states, respectively;

(b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person;

(c) the nationality of the person; and

(d) the extent to which the enforcement action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

The leading judicial authorities articulating this policy are the *Timberlane Lumber* decision in the Ninth Circuit in 1976,[15] and the *Mannington Mills* decision in the Third Circuit in 1979.[16] As the Ninth Circuit explained, there is a need for what it called a "jurisdictional rule of reason" in antitrust cases in foreign commerce.[17] The mere existence or allegation of effects upon U.S. commerce is not sufficient to sustain jurisdiction. The factors relevant to international comity have to be considered and the relative interests of the countries have to be appraised before jurisdiction can properly be asserted. The two Courts of Appeals have also set forth lists of criteria which elaborate somewhat upon the Restatement's factors.[18]

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[15] *Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976).

[16] *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979).

[17] 549 F.2d at 613.

[18] *Timberlane*, 549 F.2d at 614, stated that "The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or

This principle of comity as an inherent aspect of antitrust jurisdiction in foreign commerce has achieved widespread acceptance among antitrust authorities.[19] The U.S. Justice Department has welcomed the development, seeing the rule of comity as a means by which the courts will undertake the same balancing of factors which the Department performs in exercising its prosecutorial dis-

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principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad."

Mannington Mills, 595 F.2d at 1297-98, stated that "The factors we believe should be considered include: 1. Degree of conflict with foreign law or policy; 2. Nationality of the parties; 3. Relative importance of the alleged violation of conduct here compared to that abroad; 4. Availability of a remedy abroad and the pendency of litigation there; 5. Existence of intent to harm or affect American commerce and its foreseeability; 6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief; 7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; 8. Whether the court can make its order effective; 9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; 10. Whether a treaty with the affected nations has addressed the issue."

[19] *E.g.*, Comment, "Defenses to Actions Against Foreign States Under United States Antitrust Laws", 20 Harv. Int'l L.J. 583, 611-619 (1979); Note, "Sherman Act Jurisdiction and the Acts of Foreign Sovereigns, 77 Colum. L. Rev. 1247 (1977); Note, "Extraterritorial Application of the United States Laws: A Conflict of Laws Approach", 28 Stan. L. Rev. 1005 (1976). *See Domenicus Americana Bohio* v. *Gulf & Western Industries*, 473 F. Supp. 680, 687 (S.D.N.Y. 1979); *In re Grand Jury Proceedings*, 532 F.2d 404, 407 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976); *In re Grand Jury Subpoena*, 396 F.2d 897, 903 (2d Cir. 1968).

cretion in foreign commerce antitrust cases.[20] It is significant that, in the present case, the Departments of State and Justice have stressed that appropriate considerations of comity should be taken into account.[21]

Plaintiffs have cited to this Court the Seventh Circuit's statement in connection with the default judgment in this case, that "the *Manningon Mills* factors are not the law of this Circuit".[22] In fact, the Court of Appeals held only that this Court had not abused its discretion with respect to the defaulting parties because it was not practicable, in the absence of such parties, to weigh the factors relevant to comity.[23] This limited holding does not suggest that the Court of Appeals would not apply to the pending motions the widely-accepted "jurisdictional rule of reason" in antitrust cases in foreign commerce.

Plaintiffs argue at length about the extent to which Canadian Government policy amounted to "compulsion" of Canadian uranium producers.[24] The cited cases re-

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[20] *See, e.g.*, Address of Carl A. Cira, Jr., Assistant Chief, Foreign Commerce Section, Antitrust Division, "Current Developments in Antitrust and Foreign Trade—The Timberlane Analysis Progressing", May 23, 1979 (to the Westchester-Fairfield Corporate Counsel Association). *See* U.S. Department of Justice, Antitrust Guidelines for International Operations at 51-52 (1977).

[21] Letter from Roberts B. Owen, Legal Adviser, Department of State, dated March 17, 1980, forwarded to the U.S. Court of Appeals for the Seventh Circuit by Associate Attorney General John H. Shenefield, attached to Canada Memorandum on Sanctions, App. B; Letter from Associate Attorney General Shenefield to this Court, dated May 6, 1980.

[22] *In re Uranium Antitrust Litigation*, 1980-1 Trade Cas. ¶ 63,183 (7th Cir. 1980) at 77,897. See TVA Memorandum at 9, Westinghouse Memorandum at 16.

[23] 1980-1 Trade Cas. at 77,897.

[24] TVA Memorandum at 20-24; Westinghouse Memorandum at 37-45.

flected an earlier extreme assertion of U.S. antitrust jurisdiction, which paid scant heed to legitimate interests of other nations. Such an approach is not consonant with international comity. It is no longer the law of the United States. The very purpose of the Restatement, *Timberlane*, *Mannington Mills* and other cases is to get away from such wooden and overreaching application of U.S. antitrust jurisdiction.

The current law recognizes that the policies and interests of other nations must be recognized and given weight without requiring or expecting that they be expressed in a formalistic or legalistic manner familiar to U.S. law. Other nations can and do implement their policies and impose their requirements by other means, such as by administrative direction to government-owned corporations and by combination of pronouncements and regulatory steps, especially in a pervasively regulated sector like the Canadian uranium industry. Furthermore, instead of a narrow view of limited "defenses" like compulsion, the current law requires a broad assessment and balancing of interests in order to satisfy the demands of international comity.

Elsewhere in their briefs, plaintiffs appear to defer to Canada's interest in formulating uranium policies as it sees fit, and in effect acknowledge the paramount significance to be accorded such policies. Their briefs on the jurisdiction motions purport to disclaim any challenge to Canadian policies or to activities of the Canadian companies within the scope of such policies. Thus, TVA declares that it "does not challenge the sovereignty of another nation, the wisdom of its policy, or the integrity and motivation of its actions as they relate to the marketing arrangement".[25] Its challenge is addressed to activities of the companies which were "not within the realm of activity required by the Canadian Govern-

[25] TVA Memorandum at 17.

ment".[26] Similarly, Westinghouse affirms that it "does not challenge here the legality, propriety, or validity of any sovereign act of the Canadian government"[27] including what it calls the "limited price stabilization arrangement" condoned and approved by the Government.[28] Rather, Westinghouse "seeks to prove the considerable extent to which the members of the cartel exceeded the scope of any actions that may have been condoned by that government".[29]

Notwithstanding these disclaimers, plaintiffs assert a right to relief which would directly conflict with Canadian laws and policies. The balancing process should not permit an exercise of jurisdiction to that end.

B. *The Factors Controlling the Exercise of Jurisdiction in This Case*

Participation in the uranium marketing arrangement constituted an essential element of Canadian policy. In these circumstances, Canada considers it contrary to her sovereign prerogatives for a U.S. court to question the propriety or legality of the activities of Canadian uranium producers that were undertaken outside the United States and in compliance with or in implementation of Canadian Government laws and policies. We believe that a balancing of interests, called for by principles of international comity recognized by U.S. law, requires that antitrust jurisdiction not be exercised over claims addressed to such activities.

The factual circumstances, which require the conclusion that this Court should not exercise such jurisdiction, include the following:

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[26] TVA Memorandum at 14. *See also id.* at 3.

[27] Westinghouse Memorandum at 36.

[28] *Id.* at 16-17, 47.

[29] *Id.* at 17.

1. *Comparative National Interests*

Canada regards its uranium resource industry as vital to its national interest. It has had a long history of close involvement in, and pervasive regulation of, this sector of its economy. The international uranium marketing arrangement was but one element of governmental policy concerning management of this resource. This policy element was employed by the Government during a limited time period (1972-1975) when certain U.S. government policies threatened the survival of the entire Canadian uranium resource industry, thereby imperilling Canada's vital interests. The purpose of the international marketing arrangement was to minimize the disruptive effects threatened by American policies by allocating the meager non-U.S. demand among the non-U.S. producers, and by stabilizing prices for a transitional period.

> The government has indicated on a number of occasions that it viewed the establishment of an international marketing arrangement for uranium in 1972 to be in the national interest. It, therefore, authorized its crown corporations to participate in the arrangement and passed a regulation under the Atomic Energy Control Act requiring the Canadian uranium producers to comply with the pricing and quota provisions which had been agreed upon internationally. . . . It was necessary as a matter of public policy for the government to protect our producing industry from extinction. . . .[30]

The United States Government has acknowledged "the intensity and authenticity" of the interests of Canada

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[30] Canada Memorandum on Document Production, Att. A, Statement by Hon. A. W. Gillespie at 1. *See also* Canada Memorandum on Sanctions, App. D, Decision of the Supreme Court of Canada at 22-23.

and the other uranium producing countries.[31] Canada's right to adopt policies designed to control the marketing of a vital natural resource, particularly when the very survival of the industry producing that resource was threatened, goes to the very essence of sovereignty. This principle was recognized in *International Association of Machinists and Aerospace Workers* v. *The Organization of Petroleum Exporting Countries*, 1979-2 Trade Cas. ¶ 62,868 (C.D. Cal. 1979), where the Court referred to international recognition of "the principle that a sovereign state has the sole power to control its natural resources" [p. 79,011]:

> The control over a nation's natural resources stems from the nature of sovereignty. By necessity and by traditional recognition, each nation is its own master in respect to its physical attributes. . . . [T]here can be little question that establishing the terms and conditions for removal of natural resources from its territory . . . is a governmental activity. Plaintiff, however, asserts that . . . the actions of the OPEC nations in coming together to conspire to fix prices is commercial and, thus, not immune. Plaintiff's position, however, is untenable. [*Id.* at 79,011-012]

If this is true for the OPEC oil cartel's pricing, much greater deference should be given to the needs and interests of Canada which undertook temporary defensive

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[31] Letter from Associate Attorney General Shenefield to this Court, dated May 6, 1980; letter from Roberts B. Owen, Legal Adviser, Department of State, dated March 17, 1980 (Canada Memorandum on Sanctions, App. B). Mr. Shenefield, who was head of the Antitrust Division during the government's investigation of the uranium industry, has also recognized that "it was quite clear that foreign governments were intimately involved in the on-going actions of the cartel". Hearings before the Senate Judiciary Committee on the Nomination of John Shenefield, 96th Cong., 2d Sess. at 28 (January 24, 1980).

measures to maintain its uranium industry. In the circumstances here presented, Canada's interest in managing a vital natural resource is entitled to paramount weight. The imbalance between interests is particularly notable where, as here, we are dealing with private antitrust actions, which are entitled to less weight than governmental antitrust action or concern. *See In Re Westinghouse Electric Corp. Uranium Contracts Litigation*, 563 F.2d 992, 999 (10th Cir. 1977).

2. *Degree of Conflict*

Since activities pursuant to the uranium marketing arrangement constituted an essential element of Canadian national policy concerning resource management, a decision by this Court to exercise jurisdiction over these activities would constitute a direct threat to Canadian law and policy. Inquiry into the propriety or legality of these activities would constitute an inappropriate and unwarranted intrusion into Canadian internal affairs. Beyond this, if the Court were to proceed to grant relief that punished defendants for actions taken in pursuance of Canadian national policy, there would be a direct and unacceptable conflict with Canadian law and policy. Canada would regard it as a serious breach of international comity if there were either an assessment of damages based upon such activities or an injunction which impeded Canada's future sovereign right to control its own economy.

This conflict is exacerbated by the protectionist position adopted by the United States. Having closed its domestic market to foreign competition, it would be highly inappropriate, if not offensive, for the United States to assert that its antitrust jurisdiction guarantees U.S. companies a "right" to penetrate the remaining world market free of any constraints resulting from the laws and policies of other nations.

3. *Location of the Challenged Conduct and the Parties*

The international marketing arrangement involved the governments of Canada, Australia, South Africa and France and uranium producers in those countries. The meetings and discussions took place in such countries (or elsewhere outside the United States) and the sales under the arrangement also took place outside the United States.

4. *Relative Significance of Effects in U.S. and Other Countries*

The international marketing arrangement was intended to stabilize and allocate the non-U.S. supply of, and demand for, uranium. No significant impact on the U.S. market could have been anticipated in 1972, since the United States Government had imposed an embargo on foreign uranium and at that time there was no prospect of its removal. Any potential effect on the United States was further minimized or excluded by providing that the arrangement did not extend to sales to the United States. (This was an accommodation to U.S. interests, consonant with the approach of comity.) Furthermore, the minimum prices set during the three-year period, except on one occasion, were below the domestic U.S. price.[32]

As a result of its antitrust investigation, the Department of Justice concluded that the marketing arrangement had "minimum direct effect" upon users in the United States.[33] Similarly, Senator Metzenbaum at a

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[32] Canada Memorandum on Document Production, Att. A.

[33] *See* Hearings before the Senate Judiciary Committee on the Nomination of John Shenefield, 96 Cong., 2d Sess. at 29 (January 24, 1980). Mr. Shenefield stated that a prosecution based on substantial or foreseeable effect upon the U.S. market would very likely have failed altogether because of the U.S. embargo and other factors (*id.* at 28-29). It was further explained that the prose-

hearing of the Antitrust Subcommittee of the U.S. Senate Judiciary Committee on January 24, 1980 stated:

> The evidence is clear that the cartel was not intended to, and did not have, its primary effect on U.S. commerce. The basic price fixing and production allocation provisions were designed primarily to stabilize foreign markets. The anti-competitive action by our own Government creates a strong argument in terms of the international laws of comity against criminal prosecutions of the foreign nationals involved here.[34]

The fact that effect upon the U.S. market was not likely and, if it occurred at all was much less important than the effect in foreign markets, strongly weighs against U.S. antitrust jurisdiction in these cases.

5. *Hardship of Inconsistent Enforcement Action*

Canada has a continuing policy of regulating its uranium industry and the terms of export trade in uranium. This case involves one aspect of that policy which was a temporary defensive measure, the international marketing arrangement in 1972-75. The exercise of jurisdiction here could potentially impose vast liability upon Canadian producers for their past conduct in compliance with and in implementation of Canadian Government law and policy. This would impose severe hardship upon the Canadian producers and would diminish the ability of the Canadian Government to regulate its resource industries.

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cution against a U.S. producer, charging a conspiracy against "middlemen" U.S. firms, was brought as a misdemeanor because it was clear that such alleged conspiracy ended early in 1974 (*id.* at 31), indicating only small effect.

[34] *Id.* at 9.

6. *Potential Impact on Canadian-American Relations*

The depth of Canada's concern relating to American efforts to inquire into Canadian policy has flowed from basic notions of sovereignty and fundamental considerations of national interest. This concern has been expressed in a substantial number of diplomatic notes and other formal expressions which have evinced the deleterious consequences of the exercise of antitrust jurisdiction over this subject matter.[35] The United States Departments of Justice and State have recognized the seriousness of the conflict and the legitimacy of the foreign interests.[36]

The conflict over extraterritorial reach of U.S. antitrust jurisdiction has been aggravated in this situation by a number of factors that have been noted: (a) The international uranium marketing arrangement was established in response to U.S. protectionist policies that threatened the survival of the Canadian uranium industry; and Canada advised the United States Government that the arrangement had been initiated. (b) Canada's use of the international marketing arrangement was intended to be and was only temporary, and during its short life the arrangement did not apply to sales to end-users in the United States. Thus, the arrangement was designed to secure the interests of the producing countries in maintaining their industries and was, at the same time, designed to avoid adverse impact on the United States market.

It is unfortunate but nonetheless true that efforts of American tribunals to exercise jurisdiction over this subject matter have already had an adverse effect on Canadian-American relations. This situation is considered

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[35] Canada Memorandum on Sanctions, App. D; Canada Memorandum on Document Production, Att. B, D, E.

[36] See letters cited *supra*, n.31, p. 17.

undesirable by both governments. However, the situation does in fact exist and the likelihood of exacerbation is another element against exercise of antitrust jurisdiction.

To sum up, the relevant factors demonstrate that antitrust jurisdiction should not be exercised over the alleged activities of Canadian uranium producers which were undertaken in compliance with and in implementation of Canadian laws and policies governing uranium export transactions, including the participation in the international marketing arrangement between 1972 and 1975.

C. *The Deference to be Given Canada's Statement of Its Law and Policies*

The balancing process, above discussed, is to be undertaken in the framework of Canada's statement of its laws, policies, and actions. This is another aspect of the application of international comity in these cases.

Under established principles of international comity recognized by U.S. law, the official pronouncements of a foreign government describing its own activities must be given conclusive effect by United States courts. In the present situation, where the Canadian Government has described to this Court laws, policies, and actions concerning marketing of Canadian uranium, this Court should accept Canada's statement as the basis for its consideration.

This principle stems from the underpinnings of the act of state doctrine; judicial inquiry or intrusion into the official acts taken by a foreign government within its borders is inconsistent with a proper regard for intergovernmental political relations. The act of state doctrine requires a court not "to challenge the sovereignty of another nation, the wisdom of its policy, or the integrity and motivations of its actions". *Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d

597, 607 (9th Cir. 1976). In that light, it would be highly offensive for a court to pass on the truthfulness of an official declaration made by a friendly foreign government. *See, e.g., Banco de Espana* v. *Federal Reserve Bank*, 114 F.2d 438, 443 (2d Cir. 1940); *Bokkelen* v. *Grumman Aerospace Corp.*, 432 F. Supp. 329, 333 (E.D.N.Y. 1977).

The courts of the United States have consistently adhered to this principle, and have accepted official governmental declarations as factually dispositive. *United States* v. *Pink*, 315 U.S. 203, 218-21 (1941) (official opinion of Soviet government concerning effect of Soviet decree is conclusive); *Banco de Espana* v. *Federal Reserve Bank*, 114 F.2d 438, 443-44 (2d Cir. 1940) (affidavit from Spanish Ambassador accepted as proof of facts contained therein); *Malka* v. *E. F. Hutton & Co., Inc.*, 465 F. Supp. 131, 138 (S.D.N.Y. 1979) (the veracity of the French Government's denial of receipt of a loan cannot be examined in an American court); *D'Angelo* v. *Petroleos Mexicanos*, 422 F. Supp. 1280, 1284 (D. Del. 1976), *aff'd*, 564 F.2d 89 (3d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978) (official statement by Mexican Government representative concerning the scope and effect of Mexican decree must be accepted by American court); *Bokkelen* v. *Grumman Aerospace Corp.*, 432 F. Supp. 329, 332 (E.D.N.Y. 1977) (certified copy of minutes of Brazilian agency is dispositive of its reasons for denying export license); *United States* v. *Melekh*, 190 F. Supp. 67, 87 (S.D.N.Y. 1960) (letter from Soviet Ambassador conclusively established defendant's relationship with Soviet government).

Thus, the courts have refrained from questioning or second-guessing statements of foreign governments as to factual matters pertinent to the issues before them. Evaluation of plaintiffs' allegations in this case must be made in the context of the Canadian Government's statements of its policies, legal framework, and decisions.

CONCLUSION

Accordingly, we submit that the Court should determine that antitrust jurisdiction will not be exercised over, and does not extend to, actions of Canadian uranium producers within the scope of Canadian Government laws and policies, including their participation in the international marketing arrangement for uranium between 1972 and 1975.

Respectfully submitted,

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July 1, 1980

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Memorandum of Government of Canada as *Amicus Curiae* on Motions for Summary Judgment on Jurisdictional Grounds was sent by first-class mail, postage prepaid, to all counsel of record on July 1st, 1980.

/s/ Lionel Kestenbaum

APPENDIX Y

I. OFFICIAL STATEMENTS THAT FOREIGN NATIONS HAVE EXERCISED PERVASIVE REGULATORY CONTROL OVER ALL ASPECTS OF THEIR URANIUM INDUSTRIES.

A. *Canada.*

1. Canada has had a comprehensive regulatory system for its uranium resource industry since the birth of the industry in the 1940's. It has exercised its sovereign prerogative to regulate virtually every aspect of this industry, ranging from exploration and mining to export sales, to ensure compliance with Government pricing policy.[1]

2. As a reflection of the importance Canada attaches to its uranium exports, the Government of Canada has, for many years, regulated the export of uranium, a vital national resource. These regulations have controlled the quantities, prices and other terms of export contracts for uranium. This governmental control was authorized by, and exercised under, the Atomic Energy Control Act and pertinent regulations. Strict export controls have been enforced under that Act throughout the period of time covered in the litigation pending before Judge Marshall, and these controls continue to this day.[2]

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[1] Memorandum of Government of Canada as *Amicus Curiae* filed in U.S. District Court, N.D. Illinois (May 8, 1980), p. 9.

[2] Brief of the Government of Canada as *Amicus Curiae*, filed in U.S. Court of Appeals for the 7th Circuit (November 6, 1979), p. 2.

3. The long history of close Canadian Government involvement in and regulation of the uranium resource industry through stockpiling, export licenses and other measures clearly establishes the degree to which the Government regards the industry as vital to Canadian interests and the importance it consequently attaches to industry compliance with Government policy respecting uranium marketing.[3]

4. Canada regards its uranium resource industry as vital to its national interest. It has had a long history of close involvement in, and pervasive regulation of, this sector of its economy. The international uranium marketing arrangement was but one element of governmental policy concerning management of this resource.

. . .

From the onset Canada has exercised comprehensive and pervasive regulatory authority over the uranium industry, including exports.

. . .

While Canada's participation in an international arrangement terminated in 1975, its regulatory control over the price and other terms of export contracts has continued. The Control Board continues to regulate contracts on a transaction-by-

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[3] Diplomatic Note No. ECP-25 from Canadian Secretary of State for External Affairs to U.S. Ambassador (November 8, 1978), p. 2.

transaction basis after review by an inter-departmental panel. [Footnote omitted.] [4]

5. The basis of Canada's uranium policy is stated in the preamble to the Atomic Energy Control Act, namely that "it is essential in the national interest to make provision for the control and supervision of the development, application, and use of atomic energy, and to enable Canada to participate effectively in measures of international control of atomic energy which may hereafter be agreed upon."

To protect the national interest in the different circumstances which now face us we will henceforth require that all contracts covering the export of uranium or thorium be examined and approved by the appropriate federal agency before any application for an export permit is considered. The examination will cover all aspects and implications of the contract such as nuclear safeguards, the relationship between contracting parties, reserves, rate of exploitation, domestic requirements, domestic processing facilities, and selling and pricing policy. Approval will not normally be given to contracts of more than ten years duration unless provision is made for renegotiation of price.[5]

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[4] Memorandum of Government of Canada as *Amicus Curiae* on Motions for Summary Judgment on Jurisdictional Grounds, filed in the U.S. District Court, N.D. Illinois (July 1, 1980), pp. 16, 4, 7-8.

[5] Statement by the Hon. Otto E. Lang, Canadian Minister without Portfolio, in the House of Commons (June 19, 1969), p. 2.

6. The government has always controlled the export of uranium, under the Atomic Energy Control Act, and continues to do so.[6]

B. *South Africa.*

Since 1948, the mining, production, disposal, export and use of uranium in South Africa has been governed by the Atomic Energy Act No. 35 of 1948 and by the succeeding Atomic Energy Act No. 90 of 1967, and, under the provisions of these statutes, has been controlled by the South African Government acting through its Minister of Mines and the Atomic Energy Board established by these statutes.[7]

C. *Australia.*

1. Because of its importance to the Australian economy, the exportation of uranium from Australia has been the subject of control by the Australian Government since 1961 as part of the Government's overall policy and program for supervising important national resources. This control has been exercised through the Customs (Prohibited Exports) Regulations made under the Customs Act of 1901.[8]

2. [T]he Australian Government has been deeply involved in the control and regula-

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[6] Press Release by the Hon. Alastair Gillespie, Minister, Canadian Department of Energy, Mines and Resources, with attachments (October 14, 1977), p. 3.

[7] Brief of the Government of South Africa as *Amicus Curiae*, filed in U.S. Court of Appeals for the 7th Circuit (October 19, 1979), pp. 4-5.

[8] Brief of the Government of Australia as *Amicus Curiae*, filed in U.S. Court of Appeals for the 7th Circuit (September 27, 1979), p. 3.

tion of the uranium industry in Australia for many years and has a continuing interest in the viability of that important aspect of the Australian economy.[9]

D. *France.*

The Government of France regards uranium as vital to its national interest, with respect to energy and other sensitive national policies. . . . By ordinance dated October 18, 1945, the Government of France established the Commissariat a l'Energie Atomique ("CEA") . . . under the laws of France, and vested in the CEA full responsibility for the promotion, coordination and implementation of all aspects of French nuclear policy, including the assurance to French civil and other authorities that sufficient supplies of uranium will be available.[10]

II. OFFICIAL STATEMENTS THAT FOREIGN URANIUM INDUSTRIES WERE DEVELOPED PRINCIPALLY TO SATISFY U.S. DEMAND BUT WERE THEN DEVASTATED BY PROTECTIONIST POLICIES ADOPTED BY THE U.S. GOVERNMENT, AND THAT THE FOREIGN CARTEL WAS FORMED TO MITIGATE THE DEVASTATING IMPACT OF THE AMERICAN GOVERNMENT'S ACTIONS

A. *Canada.*

1. Canada's uranium resource industry expanded vigorously through the 1950's,

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[9] *Amicus Curiae* Brief of Government of Australia, filed in U.S. District Court, N.D. Illinois (May 29, 1980), p. 2.

[10] Memorandum from Government of France to U.S. Department of State (October 27, 1978), p. 3.

largely to meet United States demands. In the 1960's, the United States government took actions aimed at protecting its domestic uranium producers, and effectively closed the large United States market to Canadian and other foreign uranium producers. These American actions threatened the survival of the entire Canadian uranium industry, thereby imperilling Canada's national security and vital economic interests.

In an effort to minimize the disruptive effects threatened by United States policies, the Canadian government, acting in cooperation with governments of other producing countries, initiated and participated in an international uranium marketing arrangement.[11]

2. The [uranium] industry was vigorously promoted, largely in response to United States' needs, and became a substantial factor in Canada's overall resource development program. By 1959, uranium was Canada's fourth largest export by value and employed 13,600 people. The industry then entered a period of disruption and decline because of United States' actions in limiting, then closing, its domestic market to Canadian product.

. . .

This policy element [the international marketing arrangement] was employed by the Government during a limited time

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[11] Memorandum of Government of Canada as *Amicus Curiae*, filed in U.S. District Court, N.D. Illinois (May 21, 1979), pp. 2-3.

period (1972-1975) when certain U.S. government policies threatened the survival of the entire Canadian uranium resource industry, thereby imperilling Canada's vital interests. The purpose of the international marketing arrangement was to minimize the disruptive effects threatened by American policies by allocating the meager non-U.S. demand among the non-U.S. producers, and by stabilizing prices for a transitional period.[12]

3. The international uranium marketing arrangement was established in response to U.S. protectionist policies that threatened the survival of the Canadian uranium industry; and Canada advised the United States Government that the arrangement had been initiated.[13]

4. [T]he policy [the international marketing arrangement] was adopted following action by the United States Government which effectively closed the large U.S. market to Canadian and other foreign uranium producers, with severe adverse consequences for the Canadian uranium mining industry.[14]

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[12] Memorandum of Government of Canada as *Amicus Curiae* on Motions for Summary Judgment on Jurisdictional Grounds, filed in the U.S. District Court, N.D. Illinois (July 1, 1980), pp. 4-5, 16-17.

[13] Memorandum of Government of Canada as *Amicus Curiae* on Motions for Summary Judgment on Jurisdictional Grounds, filed in the U.S. District Court, N.D. Illinois (July 1, 1980), p. 23.

[14] Diplomatic Note No. ECP-25 from Canadian Secretary of State for External Affairs to U.S. Ambassador (November 8, 1978), p. 2.

5. This policy [the international marketing arrangement] was defensible in 1972 and it is no less defensible today. We were influenced in this decision by the following considerations: 1) The decision was a direct response to U.S. actions that effectively closed the U.S. market for uranium to Canadian producers.

. . .

In short, the marketing arrangement authorized by the government was temporary. It was defensive in nature and directed at protecting the Canadian industry and Canadian communities against restrictive actions by the U.S.[15]

6. The decision to support such a marketing arrangement was based on the need to preserve the Canadian mining industry and its dependent communities during a period of over-supply and consequent low prices. It was also apparent that a viable Canadian and international industry would be essential to meet a near-term resurgence of world demand for uranium.

The depressed markets resulted in large measure from the policies of the United States Government which had closed the large U.S. market to foreign uranium. At the same time U.S. corporations were competing aggressively for sales contracts outside of their protected domestic market, and uranium from the U.S. Government

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[15] Press Release by the Hon. Alastair Gillespie, Minister, Canadian Department of Energy, Mines and Resources, with attachments (October 14, 1977), pp. 2, 5.

stockpile was also being moved into the international market by means of conditions imposed on foreign users of U.S. uranium enrichment facilities.

In an effort to survive under these conditions the Canadian Government and the producing industry agreed to a series of minimum exports prices and a means of sharing the available market.

. . .

It is still our opinion that Canadian participation in the arrangement was necessary and appropriate in all of the circumstances; circumstances which resulted largely from United States policies which interfered with normal market forces.[16]

B. *France.*

The situation outside the United States soon reached crisis dimensions due to the distortions of supply and demand that had occurred. All non-United States producers were competing for sales to only about thirty percent of the free-world market. France, and other nations developed substantial surpluses due to the severe drop in demand resulting from the American embargo.

Though recognizing that the United States policies had been adopted in furtherance of United States interests, it became apparent to French officials that

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[16] Statement by the Hon. Alastair Gillespie, Minister, Canadian Department of Energy, Mines and Resources (June 14, 1977), pp. 1, 3.

some form of cooperation on a government-to-government basis was needed to mitigate the prevailing conditions which threatened the survival of French and other uranium source. The French interest as well as the one of other producing and consuming countries was to continue production so that future needs could be satisfied.[17]

C. *Australia.*

From submittals made in this proceeding by the Governments of Canada, France, and South Africa, as well as from the instant brief and other statements made on behalf of the Government of Australia, it is evident that the challenged arrangements were fostered and approved on an international basis by the governments concerned, although excluding the United States market, as a necessary response to an embargo imposed by the United States Government prohibiting the importation into the United States of foreign uranium for domestic use. [Footnote omitted.[18]]

D. *United Kingdom.*

Despite the protests of foreign governments, this total ban on the use of foreign uranium in U.S. domestic reactors continued until 1977 and is only now in the

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[17] Memorandum from Government of France to U.S. Department of State (October 27, 1978), p. 4.

[18] *Amicus Curiae* Brief of Government of Australia, filed in U.S. District Court, N.D. Illinois (May 29, 1980), p. 10.

process of being phased out under regulations adopted in 1974. Because the U.S. market represented at the time some three quarters of the world market, other U.S. policies relating to uranium supply, including the AEC's "tails assay" approach, also worked to depress significantly the prospects for foreign uranium producers. Meanwhile, U.S. companies, benefiting from this protection in their home markets, continued to sell uranium outside the United States in competition with foreign uranium producers.

These circumstances caused great concern and a reaction from the major producing nations, all of which closely controlled the conditions, including the price, on which uranium was exported.[19]

III. OFFICIAL STATEMENTS THAT FOREIGN GOVERNMENTS INITIATED, PARTICIPATED IN AND RAN THE FOREIGN CARTEL, AND SECURED COMPLIANCE AND PARTICIPATION BY THE FOREIGN URANIUM PRODUCERS IN THE CARTEL.

A. *Canada.*

1. The Canadian Government directed its Government-owned corporations to participate in the meetings of the international marketing arrangement which discussed and arrived at proposed prices and quantities and other terms for export sales. The Government also secured the partici-

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[19] *Amicus Curiae* Brief of Government of United Kingdom, filed in U.S. District Court, N.D. Illinois (August 3, 1979), pp. 4-5.

pation of all Canadian uranium producers. This was essentially done by declaring it to be Government policy to participate in the arrangement, specifying that the prices and quantities would be enforced by Government action, and making clear that company participation was expected in the national interest. Given the range of existing tools at its disposal to ensure compliance of Canadian companies with its policies, including denial of export permits, it was not necessary for the Canadian Government to seek new legislation specifically requiring companies to participate in the uranium marketing arrangements. [Footnotes omitted.]

. . .

The officials of the Canadian Crown corporations, Uranium Canada Limited and Eldorado Nuclear Limited, were acting as agents of the Government. The Uranium Canada officials were also officials of the Ministry of Energy, Mines and Resources and reported directly to the Government through their Ministry.[20]

2. The long history of close Canadian Government involvement in and regulation of the uranium resource industry clearly establishes the degree to which the Government regarded the industry as vital to Canadian interests and the importance it consequently attached to industry compliance with Government policy respecting

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[20] Memorandum of Government of Canada as *Amicus Curiae* on Motions for Summary Judgment on Jurisdictional Grounds, filed in the U.S. District Court, N.D. Illinois (July 1, 1980), pp. 6-7.

uranium marketing. For these reasons, the Canadian Government, acting in cooperation with governments of other producing countries, initiated and later participated in an international uranium marketing arrangement. The Canadian Government took this initiative and secured compliance of Canadian producers with the terms of the arrangement because it was convinced that preservation of a viable uranium producing industry was essential to the national interest.

. . .

Until the marketing arrangements were discontinued in 1975, the Canadian Government through government-owned corporations was an active participant in meetings and decisions of the marketing group. Officials of the Ministry of Energy, Mines and Resources, acting through these corporations, took an active role in all phases of the arrangement and attended meetings of producers from the various countries and of Canadian producers.

. . .

During the 1972-75 period, the participation of all Canadian uranium producers in the international marketing arrangement was a matter of firm Government policy. Compliance with this policy was secured primarily through the Atomic Energy Control Act and regulations promulgated thereunder. This policy, which was clearly expressed in the public statements of Canadian officials, was defensive in nature and was considered to be in the vital national interest of Canada.

. . .

In addition, Canadian Government officials made every effort to secure and did secure the participation of all Canadian uranium producers.

. . .

It would be improper to enter a finding, for example, . . . that the Canadian Government "made clear at all relevant times prior to 1976 that it was the producers, and not the governments, which ran the cartel", contrary to fact and to the Canadian Government's official statements, which are to be given deference. [Footnote omitted.][21]

3. [T]he participation of all Canadian uranium producers in certain uranium marketing arrangements was a matter of Canadian government policy. Compliance with this policy was secured primarily through the Atomic Energy Control Act and Regulations.

. . .

The Canadian Government took this initiative and secured compliance of Canadian producers with the terms of the arrangement because it was convinced that preservation of a viable uranium producing industry was essential to the Canadian national interest in the light of projections of future uranium requirements.[22]

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[21] Memorandum of Government of Canada as *Amicus Curiae*, filed in U.S. District Court, N.D. Illinois (May 8, 1980), pp. 14, 15, 16, 36.

[22] Diplomatic Note No. ECP-25 from Canadian Secretary of State for External Affairs to U.S. Ambassador (November 8, 1978), pp. 1, 2.

4. The marketing arrangement was implemented in Canada in part through general Ministerial directions, issued to the Atomic Energy Control Board, which prescribed minimum prices and allocated quantities for export sales to end-users in countries other than the participating countries and the United States. Prices and terms for other export sales covered by the arrangement, such as sales to manufacturers for resale and use in countries other than the participating countries or the United States, were regulated by the Atomic Energy Control Board on a transaction-by-transaction basis.[23]

5. In an effort to minimize the disruptive effects threatened by United States policies, the Canadian government, acting in cooperation with governments of other producing countries, initiated and participated in an international uranium marketing arrangements.

. . .

During 1972-75, however, the participation of all Canadian uranium producers in this marketing arrangement was a matter of firm Canadian government policy. Compliance with this policy was secured primarily through the Atomic Energy Control Act and Regulations. This policy, which was defensive in nature and temporary in application, was considered to

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[23] Memorandum of Government of Canada as *Amicus Curiae* on Motions for Summary Judgment on Jurisdictional Grounds, filed in the U.S. District Court, N.D. Illinois (July 1, 1980), p. 6.

be in the vital national interest of Canada.[24]

6. The government has indicated on a number of occasions that it viewed the establishment of an international marketing arrangement for uranium in 1972 to be in the national interest. It, therefore, authorized its crown corporations to participate in the arrangement and passed a regulation under the Atomic Energy Control Act requiring the Canadian uranium producers to comply with the pricing and quota provisions which had been agreed upon internationally. . . . It was necessary as a matter of public policy for the government to protect our producing industry from extinction and to do so by helping to stabilize world prices at levels above the cost of production.[25]

7. I have the honour to inform you that the policy of the Canadian Government was to support and participate in international uranium marketing arrangements from 1972 to 1975 to ensure the survival of the Canadian uranium industry which was being damaged by the restrictive uranium trade practices of the United States. Canadian Ministers and officials were acting within their authority in this matter and acted in the way they did to protect Canadian national interests. The Cana-

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[24] Memorandum of Government of Canada as *Amicus Curiae*, filed in U.S. District Court, N.D. Illinois (May 21, 1979), pp. 3, 4.

[25] Press Release by The Hon. Alastair Gillespie, Minister, Canadian Department of Energy, Mines and Resources, with attachments (October 14, 1977), pp. 1-2.

dian Government finds it objectionable that this Canadian Government policy should be questioned under United States law.

I have the further honour to inform you that the participation of all Canadian uranium producers in these uranium marketing arrangements was a matter of Canadian Government policy to ensure the survival of the industry and, accordingly, to protect the Canadian national interest. Canadian Government policy in this regard was implemented through the Atomic Energy Control Act and Regulations. These Regulations provide, *inter alia*, that no person shall produce, mine, prospect for, refine, use, sell, export, import or possess for any purpose natural uranium, except in accordance with a license issued by the Atomic Energy Control Board.[26]

8. [I]t is clear that the Government's establishment of and participation in the marketing arrangement was based on its view that the arrangement was essential to Canada's national interests.[27]

9. Because it was the government's opinion that the arrangement was in the national interest, it passed a Regulation in July 1972 under S.9 of the Atomic Energy Control Act authorizing the AECB, in con-

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[26] Diplomatic Note No. FLP-177 from Canadian Acting Secretary of State for External Affairs to U.S. Ambassador (August 15, 1977), pp. 1-2.

[27] Memorandum of Government of Canada as *Amicus Curiae* filed in U.S. District Court, N.D. Illinois (May 8, 1980), p. 16.

sidering export contracts for uranium, to ensure that prices and quantities as specified in Direction to the board by the Minister of Energy, Mines and Resources pursuant to S.7 of that Act, were followed.[28]

B. *Australia.*

1. The marketing arrangements in question formed part of a fundamentally important Australian Government policy for the control of production and export of Australian uranium.[29]

2. The United States Government did not alter its announced policies and, in these circumstances, it was the policy of the Australian Government that its uranium producers should engage in discussions with uranium producers of other countries, outside the United States, with respect to the stabilization of prices in the world market which, as a result of the United States government decision, excluded the United States market.[30]

3. On 27 June 1972 the then Minister for National Development specifically endorsed in writing the principles relating to the export of uranium from Australia as negotiated by the uranium industry at the Johannesburg meeting. The Minister's ap-

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[28] Press Release by The Hon. Alastair Gillespie, Minister, Canadian Department of Energy, Mines and Resources, with attachments (October 14, 1977), p. 6.

[29] *Amicus Curiae* Brief of Government of Australia, filed in U.S. District Court, N.D. Illinois (May 29, 1980), p. 8.

[30] *Amicus Curiae* Brief of Government of Australia, filed in U.S. District Court, N.D. Illinois (May 29, 1980), p. 7.

proval was conveyed on the following day to the Australian uranium producers.[31]

4. It will be apparent from the foregoing information that the arrangements which were made by Australian uranium producers for the marketing of Australian uranium were made with the approval of the Australian Government. Since 1961 every contract providing for the export of uranium from Australia has needed the approval of the Australian Government. It will be apparent also that the arrangements have formed part of a fundamentally important Australian governmental policy for the control of all aspects of the uranium industry. That policy has been formally administered through an Australian law, namely, the Customs Act of 1901.[32]

5. Pursuant to the Government's policy of controlling all significant aspects relating to the export of Australian uranium, on 28 September 1972 the then Minister for National Development made a further statement to the Australian Parliament . . . in the course of which he referred to the part which the Australian Government had taken in discussions with the Governments of Canada and France, and in which he referred to the meetings that had been held in Paris and Johannesburg between companies of the major

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[31] Diplomatic Note No. 13/78 from Australian Embassy to U.S. Secretary of State (March 23, 1978), p. 6.

[32] Diplomatic Note No. 13/78 from Australian Embassy to U.S. Secretary of State (March 23, 1978), p. 7.

uranium producing countries in the western world outside the United States.[33]

C. *France.*

As is summarized below, at all time URANEX's participation in meetings of uranium producers was under instructions from appropriate French authorities. To attack URANEX's conduct is in fact to attack the conduct of the Government of France.

. . .

As far as the Government of France is concerned, the following facts relating to URANEX and the uranium market are incontrovertible and must lead to the conclusion that the exercise of jurisdiction by a United States court would be improper . . . 3—The activities of URANEX alleged by TVA to violate United States antitrust laws were, in fact, carried out subject to the direction, control and authorization of the CEA and other arms of the French Government.

. . .

After a series of earlier informal contracts, in early February 1972, at the initiation of the French Government and another government, government and producer representatives from France, and four other countries met in Paris and reached informal agreements relating to prices and markets designed to avoid the

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[33] Diplomatic Note No. 13/78 from Australian Embassy to U.S. Secretary of State (March 23, 1978), p. 4.

ruination to the non-US uranium mining industry.

. . .

Representatives of the same governments and producer groups met on several occasions between 1972 and 1975 to discuss actions which they thought necessary to preserve the viability of the uranium industry outside the United States, including the establishment of floor prices for sales of uranium outside the United States . . . The participation of URANEX representatives, and other representatives of the French Government was at all times on behalf of the French Government interests and policy and in furtherance of vital French national interests regarding uranium and nuclear energy.[34]

D. *South Africa.*

Early in 1972 the South African Government approved the participation of representatives of South African uranium producers in meetings with other world uranium producers, excluding producers in the United States, the purpose of which was to review the implications of market conditions then prevailing for such producers and the nuclear power industry.

Subsequent to the 1972 meetings certain criteria designed to regulate production, prices and terms for export of uranium, based on the outcome of the 1972 discussions, were approved by the South Afri-

[34] Memorandum from Government of France to U.S. Department of State (October 27, 1978), pp. 1, 3, 4-5.

can Government and applied by the President of the Atomic Energy Board under authority delegated to him by the Government in terms of the 1967 Act. Under the Atomic Energy Act, in order to obtain the authority to sell South African uranium, producers were legally obliged to observe these criteria.

The adoption of these criteria by the South African Government was deemed by it to be in the national interest in order to stabilize the market and the non-U.S. uranium industry.[35]

IV. OFFICIAL STATEMENTS THAT THE FOREIGN CARTEL SPECIFICALLY EXCLUDED THE U.S. MARKET FROM THE TERMS OF THE ARRANGEMENT, BUT THAT FOREIGN GOVERNMENTS NONETHELESS REGULATED THE TERMS OF ALL EXPORT SALES, INCLUDING THOSE TO THE U.S.A.

A. *Canada.*

1. The arrangement did not apply to sales to consumers in participating countries and in the United States. [Footnote omitted.][36]

2. The marketing arrangement was implemented in Canada in part through General Ministerial directions, issued to the Atomic Energy Control Board, which prescribed minimum prices and allocated quantities

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[35] Brief of the Government of South Africa as *Amicus Curiae*, filed in U.S. Court of Appeals for the 7th Circuit (October 19, 1979), pp. 7-8.

[36] Memorandum of Government of Canada as *Amicus Curiae*, filed in U.S. District Court, N.D. Illinois (May 8, 1980), p. 15.

for export sales to end-users in countries other than the participating countries and the United States.[37]

3. No significant impact on the U.S. market could have been anticipated in 1972, since the United States Government had imposed an embargo on foreign uranium and at that time there was no prospect of its removal. Any potential effect on the United states was further minimized or excluded by providing that the arrangement did not extend to sales to the United States. (This was an accommodation to the U.S. interests, consonant with the approach of comity.)

. . .

Canada's use of the international marketing arrangement was intended to be and was only temporary, and during its short life the arrangement did not apply to sales to end-users in the United States.[38]

4. Canadian laws and policies which have been described in official statements clearly applied to transactions by Canadian uranium producing companies with parties such as the plaintiffs in these cases during the period in question. The prices and terms of all uranium export sales from Canada (including those to the U.S.A.) have been reviewed and regulated by the Canadian Government. For example, sales

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[37] Memorandum of Government of Canada as *Amicus Curiae* on Motions for Summary Judgment on Jurisdictional Grounds, filed in the U.S. District Court, N.D. Illinois (July 1, 1980), p. 6.

[38] Memorandum of Government of Canada as *Amicus Curiae* on Motions for Summary Judgment on Jurisdictional Grounds, filed in the U.S. District Court, N.D. Illinois (July 1, 1980), pp. 20, 23.

to TVA were subject to Government review and control; indeed, this Court has previously been provided with evidence of the Government's rejection of a proposed sale contract with TVA. All export contracts were reviewed to assure conformity with the Government policies, including obtaining the optimum return for Canada's uranium resources. [Footnotes omitted.] [39]

5. The Canadian Government's control of commercial terms under which uranium is exported applies to all exports, including those for end use in the United States. Prior to 1975, essentially all deliveries of uranium for end use in the United States were sold to the United States Atomic Energy Commission under contracts negotiated during the 1950's; however in the mid-1970's certain Canadian producers concluded contracts directly with U.S. customers. The terms and conditions of these contracts, including prices and volumes, were subject to review and approval by the regulating agencies.[40]

6. I am releasing today, the seven general Directions dealing with prices and quotas that were issued between 1972 and 1975 by the Minister to the AECB. In considering these Directions, the following points are particularly relevant: 1) All the Di-

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[39] Memorandum of Government of Canada as *Amicus Curiae* on Motions for Summary Judgment on Jurisdictional Grounds, filed in the U.S. District Court, N.D. Illinois (July 1, 1980), p. 8.

[40] Memorandum of Government of Canada as *Amicus Curiae*, filed in U.S. District Court, N.D. Illinois (May 8, 1980), pp. 8-9.

rections make it explicit that the Canadian and U.S. markets were to be excluded from the agreed marketing arrangements. However, the government continued through this period, as it does now, to regulate and review the export of uranium to all countries to ensure that the terms and conditions of such exports were and are in the public interest.[41]

7. Beginning in 1969 the Government used its regulatory authority to establish and carry out a system for review of all aspects of export contracts, including pricing policy and sales terms. Since 1972, Ministerial directions under the Atomic Energy Control Act dealing with price, quantity and other terms have been issued to the Atomic Energy Control Board, which reviews and regulates all uranium export contracts. [Footnotes omitted.] [42]

8. While Canada's participation in an international arrangement terminated in 1975, its regulatory control over the price and other terms of export contracts has continued. The Control Board continues to regulate contracts on a transaction-by transaction basis after review by an interdepartmental panel.[43]

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[41] Press Release by The Hon. Alastair Gillespie, Minister, Canadian Department of Energy, Mines and Resources, with attachments (October 14, 1977), p. 5.

[42] Memorandum of Government of Canada as *Amicus Curiae* on Motions for Summary Judgment on Jurisdictional Grounds, filed in the U.S. District Court, N.D. Illinois (July 1, 1980), p. 5.

[43] Memorandum of Government of Canada as *Amicus Curiae* on Motions for Summary Judgment on Jurisdictional Grounds, filed in the U.S. District Court, N.D. Illinois (July 1, 1980), pp. 7-8.

B. *Australia.*

> [T]he policy of the Australian Government was that its uranium producers should engage in discussions with uranium producers of other countries, outside the United States, with respect to the stabilization of prices in the world market which, as a result of the United States Government decision, excluded the United States market.[44]

C. *France.*

> [T]he agreements reached at these meetings were intended expressly to exclude the United States from their scope.[45]

V. OFFICIAL STATEMENTS THAT VARIOUS FOREIGN STATUTES AND REGULATIONS PROHIBITING PRODUCTION OF DOCUMENTS AND TESTIMONIAL EVIDENCE WERE ENACTED TO PROTECT THE VITAL NATIONAL INTERESTS OF FOREIGN GOVERNMENTS AND ARE PART OF THEIR REGULATORY POLICIES CONCERNING THEIR URANIUM INDUSTRIES.

A. *Canada.*

1. The Regulations were enacted to serve a vital national interest—the preservation of Canada's past and future sovereign authority to secure compliance with its own

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[44] Brief of the Government of Australia as *Amicus Curiae*, filed in the U.S. Court of Appeals for the 7th Circuit (October 19, 1979), pp. 3-4.

[45] Memorandum from Government of France to U.S. Department of State (October 27, 1978), p. 4.

laws and policies respecting a vital Canadian natural resource. The Government's authority would be undermined if the multinational corporations that play a major role in the Canadian industrial and resource sectors were to be more responsive in their Canadian activities to U.S. laws than to Canadian law and policy. The Regulations cannot be considered apart from the history of direct government participation in the marketing arrangement and the Canadian Government's role as industry regulator over the past 30 years. As we have previously stated, the Regulations were not procured by members of the uranium industry and were not adopted to protect the commercial interests of those companies. They were enacted to carry out matters of government interest and policy. [Footnote omitted.] [46]

2. [W]hen it became clear that documents located in Canada bearing on the international uranium marketing arrangement might be removed to the United States in response to proceedings there, the Canadian government promulgated the Uranium Information Security Regulations, on September 23, 1976. The Canadian government promulgated the Regulations to serve a vital national interest, particularly the preservation of Canada's past and future sovereign authority to secure compliance with its own laws and policies

[46] Memorandum of Government of Canada as *Amicus Curiae*, filed in U.S. District Court, N.D. Illinois (May 8, 1980), pp. 17-18.

respecting a vital Canadian natural resource in the face of assertions of jurisdiction by non-Canadian tribunals. These Regulations were not procured by members of the uranium industry, and they were not adopted to protect the commercial interests of those companies. [Footnote omitted.] [47]

3. [T]he Canadian material called for by the U.S. subpoenas contains information in respect of activities approved and supported by the Canadian government. Clearly this must be regarded as an issue of sovereignty. The government has therefore moved to prevent the removal of such documents from Canada.[48]

4. The *Uranium Information Security Regulations* are a separate issue. In essence, they awere designed to protect the sovereignty of Canada in the face of extraterritorial application of U.S. legal processes.[49]

5. Canada's unwavering insistence that the Regulations be enforced reflects the governmental policy decision that disclosure of documents and information covered by the Regulations would be inimical to the

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[47] Memorandum of Government of Canada as *Amicus Curiae*, filed in U.S. District Court, N.D. Illinois (May 21, 1979), pp. 4-5.

[48] Statement by the Hon. Alastair Gillespie, Minister, Canadian Department of Energy, Mines and Resources (September 22, 1976), p. 2.

[49] Press Release by The Hon. Alastair Gillespie, Minister, Canadian Department of Energy, Mines and Resources, with attachments (October 14, 1977), p. 7.

national interest of Canada. [Footnote omitted.] [50]

6. It has been the continuing and oft-stated policy of the Canadian government since September 23, 1976 to enforce these Regulations. Substantial criminal penalties are provided for violation of the Regulations.[51]

7. The *Uranium Information Security Regulations* are expressive of a vital Canadian national interest. The importance that the Canadian Government attaches to enforcement of these Regulations has been underscored by its protests to the exercise of enforcement jurisdiction. [Footnotes omitted.] [52]

B. *Australia.*

Moreover, as is explained in the attached letters for not granting consent, the orders issued pursuant to the statute were made because the then Attorney-General was satisfied that the restrictions provided in them were desirable for the purpose of protecting the Australian national interest.[53]

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[50] Memorandum of Government of Canada as *Amicus Curiae*, filed in U.S. District Court, N.D. Illinois (May 21, 1979), p. 7.

[51] Brief of the Government of Canada as *Amicus Curiae*, filed in U.S. Supreme Court (April 17, 1978), p. 3.

[52] Brief of the Government of Canada as *Amicus Curiae*, filed in U.S. Supreme Court (April 17, 1978), p. 10.

[53] Letter from Australian Ambassador to U.S. District Court, N.D. Illinois (May 25, 1979), p. 3.

C. *France.*

> [T]he Government of France is concerned that submission to jurisdiction by URANEX would result in an unauthorized judicial inquiry into the motivations of the Government of France and could subject it to pretrial document and other discovery, which discovery in itself would be as much an affront to French sovereignty as would an adjudication by the court of the matters raised by TVA.[54]

D. *South Africa.*

> [T]he South African Atomic Energy Board, acting in terms of the powers conferred upon it by the South African Atomic Energy Act 1967, was not prepared to authorize the production of documents or disclosure of information in South Africa connected with the discussions or meetings which took place between uranium producers in the period 1972 to 1975 (whether in or outside South Africa) concerning the export of uranium or the prices or terms on which uranium was sold or exported.[55]

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[54] Memorandum from Government of France to U.S. Department of State (October 27, 1978), p. 2.

[55] Brief of the Government of South Africa as *Amicus Curiae*, filed in U.S. Court of Appeals for the 7th Circuit (October 19, 1979), pp. 10-11.

VI. OFFICIAL STATEMENTS OBJECTING TO THE EXTRATERRITORIAL APPLICATION OF U.S. LAW TO THE ACTIVITIES OF THE FOREIGN CARTEL AND TO THE IMPOSITION OF SANCTIONS BECAUSE A PARTY IS PRECLUDED BY FOREIGN LAW AND POLICY FROM PRODUCING DOCUMENTS AND INFORMATION LOCATED ABROAD.

A. *Canada.*

1. Since activities pursuant to the uranium marketing arrangement constituted an essential element of Canadian national policy concerning resource management, a decision by this Court to exercise jurisdiction over these activities would constitute a direct threat to Canadian law and policy. Inquiry into the propriety or legality of these activities would constitute an inappropriate and unwarranted intrusion into Canadian internal affairs. Beyond this, if the Court were to proceed to grant relief that punished defendants for actions taken in pursuance of Canadian national policy, there would be a direct and unacceptable conflict with Canadian law and policy. Canada would regard it as a serious breach of international comity if there were either an assessment of damages based upon such activities or an injunction which impeded Canada's future sovereign right to control its own economy.

. . .

The exercise of antitrust jurisdiction in this case is a subject of great concern to the Government of Canada. In its view, it is objectionable that actions of the Ca-

nadian uranium industry, taken outside the United States in accordance with Canadian law and in response to declared national policy, should give rise to civil or criminal liability in the United States. The Government cannot accept a situation in which its ability to ensure compliance by the Canadian private sector with its laws and industrial policies would be undermined.[56]

2. Canada considered it contrary to her sovereign prerogatives for foreign tribunals to question the propriety or legality of the actions of Canadian uranium producers that were taken outside the United States and were required by Canadian law or taken in implementation of Canadian government policy.[57]

3. The government finds it objectionable that the actions of Canadian uranium producers, which were required by Canadian law and taken pursuant to Canadian policy, should be called into question by foreign courts.

. . .

These limited restrictions continue to be necessary to ensure that Canadian sovereignty is adequately protected from the extraterritorial application of U.S. legal

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[56] Memorandum of Government of Canada as *Amicus Curiae* on Motions for Summary Judgment on Jurisdictional Grounds, filed in the U.S. District Court, N.D. Illinois (July 1, 1980), pp. 19-20, 1-2.

[57] Memorandum of Government of Canada as *Amicus Curiae*, filed in U.S. District Court, N.D. Illinois (May 21, 1979), p. 4.

processes. Other countries, such as Australia, have enacted legislation designed to deal with threats of interference with their sovereignty by foreign legal processes and the Canadian government may at some point have to consider introducing such legislation.[58]

4. Participation in the uranium marketing arrangement constituted an essential element of Canadian policy. In these circumstances, Canada considers it contrary to her sovereign prerogatives for a U.S. Court to question the propriety or legality of the activities of Canadian uranium producers that were undertaken outside the United States and in compliance with or in implementation of Canadian Government laws and policies.

. . .

The depth of Canada's concern relating to American efforts to inquire into Canadian policy has flowed from basic notions of sovereignty and fundamental considerations of national interest. This concern has been expressed in a substantial number of diplomatic notes and other formal expressions which have evidenced the deleterious consequences of the exercise of antitrust jurisdiction over this subject matter.[59]

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[58] Press Release by the Hon. Alastair Gillespie, Minister, Canadian Department of Energy, Mines and Resources, with attachments (October 14, 1977), pp. 8, 10.

[59] Memorandum of Government of Canada as *Amicus Curiae* on Motions for Summary Judgment on Jurisdictional Grounds, filed in the U.S. District Court, N.D. Illinois (July 1, 1980), pp. 16, 22.

5. In respect of these proceedings, the position of the Canadian Government as expressed in the public statements of The Honourable Alastair Gillespie, the Minister of Energy, Mines and Resources, and in Diplomatic Notes presented to the Department of State has consistently been that it would be contrary to the national interest of Canada for the propriety or legality of actions of Canadian uranium producers taken outside the United States and which were required by Canadian law or taken in implementation of Canadian Government policy to be called into question before United States courts and tribunals.[60]

6. Under established principles of international comity recognized by U.S. law, the official pronouncements of a foreign government describing its own activities must be given conclusive effect by United States courts. In the present situation, where the Canadian Government has described to this Court laws, policies, and actions concerning marketing of Canadian uranium, this Court should accept Canada's statement as the basis for its consideration.[61]

7. A situation in which courts of the United States imposed sanctions for failure to produce documents or information located in Canada where such production

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[60] Diplomatic Note No. 116 from Canadian Embassy to U.S. Department of State (March 15, 1978), pp. 2-3.

[61] Memorandum of Government of Canada as *Amicus Curiae* on Motions for Summary Judgment on Jurisdictional Grounds, filed in the U.S. District Court, N.D. Illinois (July 1, 1980), p. 24.

would violate Canadian laws and regulations would be a matter of serious concern to the Government of Canada because it would subordinate to the procedures of U.S. courts the authority of the Government of Canada to prohibit the disclosure of certain information in Canada relating to the production and marketing of Canadian uranium.

. . .

The Government of Canada has expressed on a number of occasions its serious concern that acts relating to the Canadian uranium industry, done outside the United States in accordance with Canadian law and in response to the declared national policy of the Canadian Government, should give rise to civil or criminal liability in the United States. One manifestation of this serious concern is the Uranium Information Security Regulations. These Regulations were approved by the Canadian Government to prevent documents and information in Canada from being produced for use in legal proceedings outside Canada where those proceedings seek to attach civil or cirminal liability for acts done outside the national territory of the courts concerned in accordance with Canadian law and in response to declared Canadian policies. The Regulations themselves, therefore, were put in place to serve a vital Canadian national interest, preservation of the Canadian Government's liability to secure compliance with its own laws and policies respecting a vital Canadian natural re-

source in the face of assertions of jurisdiction by non-Canadian tribunals.

A number of parties to various civil actions before United States courts have made urgent and vigorous requests to the Canadian Government for a waiver from the Regulations, amendment to the Regulations or any other action on the part of the Canadian Government which would enable them to comply with the orders of the U.S. courts. The Government has refused each of these requests and has continued to prevent production of the documents and information in question because it considers disclosure of documents to which the Uranium Information Security Regulations apply to be inimical to the national interest of Canada. The Canadian Government has also declined to release certain documents and information for the same reason when requested to do so by the Government of the United States for use in proceedings before a U.S. Grand Jury.

The Government of Canada wishes to state its serious objection to the imposition of any sanction by the judicial branch of the United States Government for failure to produce documents or to disclose information located in Canada where such production or disclosure would require a person or corporation in Canada to perform an act or omission in Canada which is prohibited by the Uranium Information Security Regulations or any other law of Canada. The threat or imposition of any

such sanction would have the appearance of an attempt to induce the performance in Canada of acts which are prohibited in Canada and of attaching liability for acts performed in Canada in accordance with Canadian law and the publicly declared policy of the Canadian Government.[62]

8. The Canadian Government would be deeply concerned if the courts of the United States were to seek to induce behavior in Canada contravening Canadian law. Such action by United States courts would be inconsistent with international comity.[63]

9. The Canadian government has, on a number of occasions, expressed the seriousness with which it regards efforts of U.S. litigants to obtain United States court orders that would induce behavior in Canada violative of the Regulations.[64]

10. [I]t would not be proper to take adverse action against any party because of the failure to produce documents or information when its failure is due to the fact that production is prohib-

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[62] Diplomatic Note No. ECP-25 from Canadian Secretary of State for External Affairs to U.S. Ambassador (November 8, 1978), pp. 1, 2 and 3.

[63] Diplomatic Note No. 116 from Canadian Embassy to U.S. Department of State, March 15, 1978, p. 1.

[64] Memorandum of Government of Canada as *Amicus Curiae*, filed in U.S. District Court, N.D. Illinois (May 21, 1979), p. 7.

ited by the law of a friendly foreign country, such as Canada.

. . .

Principles of international comity preclude adverse action against any party because such party's compliance with the prohibition of Canadian law and the consequent inability to produce documents and information in this litigation.[65]

11. The Canadian Government is deeply concerned that an order has been issued by a United States court, the effect of which would be to compel the identification and production of documents in Canada contrary to Canadian law, a result that would be inconsistent with international comity.[66]

B. *Australia.*

1. In view of the serious effect that recovery under the judgment in these proceedings could have upon the Australian national interest, the Australian Government felt bound to take such action as was avialable to it to ensure that the judgment would not be enforceable in Australia.[67]

2. The Court's attention is particularly invited to the attached Second Reading

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[65] Memorandum of Government of Canada as *Amicus Curiae*, filed in U.S. District Court, N.D. Illinois (May 8, 1980), pp. 2, 23.

[66] Diplomatic Note No. 620 from Canadian Embassy to U.S. Department of State (December 9, 1977), p. 2.

[67] Brief of the Government of Australia as *Amicus Curiae* filed in U.S. Court of Appeals for the 7th Circuit (September 27, 1978), p. 4.

speech of the then Attorney-General, in which he stated, with particular reference to the above-mentioned and other uranium litigation that 'claims are being made that the United States anti-trust laws have an operation outside the United States to an extent which is beyond what is generally conceded in international law and beyond what other countries are presently prepared to concede in relation to the pending proceedings.'[68]

3. Australia has become increasingly concerned at the extent to which United States antitrust laws are being applied to conduct outside the United States by Australian companies or Australian citizens acting consistently with Australian law or policy.

United States antitrust laws are applied to the foreign commerce of the United States. What has to be remembered is that the foreign commerce of the United States is also the foreign commerce of another country or countries. That is the nature of international commerce. The United States is, as we see it, seeking to impose its national laws in ways which create conflict with the laws or policies of other countries.

Every country, of course, has the right to seek to protect its own interests and the interests of its citizens and corporations. But when that protection is sought

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[68] Letter from Australian Ambassador to U.S. District Court, N.D. Illinois (May 25, 1979), pp. 2-3.

to be extended in ways that seriously interfere with and compromise the conduct of trade and commerce between nations, and that raise the risk of creating difficulties in international relations, then we need to think very carefully about what we are doing.

Nobody should be left in any doubt as to the seriousness with which we view the current private treble damages suit under your antitrust laws which has been instituted by Westinghouse Electric Corporation against a number of United States and foreign companies. Four major Australian companies are involved. Australian companies are already being disadvantaged and their ability to trade and conduct their affairs normally is being affected in a wide range of mineral commodities. This is certainly not in our interests nor, would I have thought, in yours.[69]

C. *France.*

TVA's complaint against URANEX thus unavoidably seeks to hold unlawful under United States law the policies and actions of the French Government, acting in its sovereign capacity with regard to the sensitive political and economic issues raised by uranium and nuclear energy policy. Such an extra-territorial application of United States law, as outlined above,

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[69] Address by the Rt. Hon. J. D. Anthony, M.P., Australian Deputy Prime Minister (December 12, 1979), pp. 7-8.

would constitute an unjustifiable invasion of French sovereignty.

. . .

It is the view of the Government of France that this litigation represents an attempt to impose a judicial solution upon matters which if considered by the U.S. Government as being issues, would be proper for resolution only on a government-to-government basis. We informed the United States of the governmental nature of these problems in our communique of March 1978 in connection with the then ongoing grand jury relating to uranium.

. . .

We reiterate the suggestion by the Government of France that, if discussions on matters pertaining to, an alleged uranium marketing organization are considered necessary they should take place directly with the US Government and the governments of other nations.[70]

D. *South Africa.*

Having regard to the conflict of national and international laws and of legal opinion, the South African Government considers there is no legal ground or justification for the extraterritorial application of U.S. antitrust laws to South African companies whose association and activities with other uranium producers directed at stabilizing the industry outside

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[70] Memorandum from Government of France to U.S. Department of State (October 27, 1978), pp. 5, 1.

the U.S. was not only lawful in terms of South African law but considered by the South African Government in its national interest.[71]

E. *United Kingdom.*

1. This proceeding invokes the extraterritorial application of U.S. antitrust law, which the British Government regards as penal, to activities carried on outside the United States by citizens of the United Kingdom who are not present in the United States. The British Government has consistently maintained that such assertions of jurisdiction are inconsistent with international law and unfairly subject British enterprises to the sharply conflicting demands and policies of different sovereign governments. Furthermore, because of the international ramifications of the disputes posed in this litigation, significant decisions made in its course are likely to have serious effects on international trade and investment well beyond the confines of the uranium industry. Moreover, uranium is itself of major importance to the British Government for energy and national defense purposes.[72]

2. Finally, and most important, the U.S. courts claim subject matter jurisdiction

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[71] Memorandum of Government of South Africa as *Amicus Curiae*, filed in U.S. District Court, N.D. Illinois (August 16, 1979), p. 11.

[72] Brief of the Government of the United Kingdom, filed in the U.S. Court of Appeals for the 7th Circuit (October 19, 1979), p. 3-4.

over activities of non-U.S. persons outside the U.S.A. to an extent which is quite unacceptable to the U.K. and many other nations. Although in recognition of international objections to the wide reach of anti-trust law enforcement in civil cases, the U.S. courts have begun to devise tests which may limit the circumstances in which the remedy may be available, these tests remain within these wider claims to jurisdiction to which Her Majesty's Government object.[73]

3. I am speaking here, as I have already explained, as a member of a government which is determined to restore the primacy of competition and enterprise in the economy of the United Kingdom. But what is discouraged or illegal in one country may be legal or positively encouraged in another. And the so-called quote effect unquote doctrine of US law is leading to many instances where United States authorities are seeking to exercise their regulatory or investigatory powers over individuals or companies situated and operating outside the United States in ways which appear thoroughly objectionable in the countries concerned. Take, for example, the current anti-trust case alleging a cartel of non-U.S. uranium producers.[74]

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[73] Diplomatic Note No. 225 from British Embassy to U.S. Department of State (November 27, 1979), p. 4.

[74] Address by the Rt. Hon. John Nott, M.P., British Secretary of State for Trade (September 14, 1979), p. 7.

VII. OFFICIAL STATEMENTS THAT THE EXERCISE JURISDICTION BY U.S. COURTS WITH REGARD TO THE FOREIGN CARTEL AND IN DISREGARD OF FOREIGN PROHIBITIONS AGAINST PRODUCTION OF DOCUMENTS HAVE ALREADY HAD ADVERSE EFFECTS ON INTERNATIONAL RELATIONS AND WOULD HAVE SUCH FURTHER EFFECTS.

A. *Canada.*

1. It is unfortunate but nonetheless true that efforts of American tribunals to exercise jurisdiction over this subject matter have already had an adverse effect on Canadian American relations. This situation is considered undesirable by both governments. However, the situation does in fact exist and the likelihood of exacerbation is another element against exercise of antitrust jurisdiction.[75]

2. A massive judgment against a Canadian company in the circumstances of this case would have adverse implications for relations between Canada and the United States.[76]

3. Such a failure on the part of courts in the United States to recognize the authority of the Canadian Government to prohibit such disclosure would be contrary

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[75] Memorandum of Government of Canada as *Amicus Curiae* on Motions for Summary Judgment on Jurisdictional Grounds filed in the U.S. District Court, N.D. Illinois (July 1, 1980), p. 23.

[76] Brief of the Government of Canada as *Amicus Curiae*, filed in U.S. Court of Appeals for the 7th Circuit (November 6, 1979), p. 6.

to generally accepted principles of international law and would have an adverse impact on relations between the USA and Canada.

. . .

Such procedure would be inconsistent with generally accepted principles of international law, with the manner in which the Governments of Canada and the United States carry on their mutual relations and with the spirit of those relations.[77]

4. The Canadian and American governments have been engaged in consultations exploring cooperation in enforcement of the countries' respective antitrust laws and avoidance of potential conflicts between the applications of the United States antitrust laws and Canadian sovereign interests. These consultations are in advanced stage, and a judicial decision insensitive to Canadian sovereignty could adversely affect this process.[78]

B. *Australia.*

The Australian Government is concerned that the effect of a judgment for damages against the Australian defendants and the continuing enforcement of that judgment may constitute a serious

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[77] Diplomatic Note ECP-25 from Canadian Secretary of State for External Affairs to U.S. Ambassador (November 8, 1978), pp. 1, 3.

[78] Memorandum of Government of Canada as *Amicus Curiae*, filed in U.S. District Court, N.D. Illinois (May 21, 1979), p. 14.

irritant of indefinite duration in bilateral relations between Australia and the United States of America.[79]

C. *France*

We are concerned that submission to jurisdiction may cause embarrassment to other nations and may affect French relations with those other nations. Indeed, one of the reasons this matter must if necessary be resolved by the respective governments is that neither the French nor any other government, including the U.S., could properly permit disclosure of intimate facts relating to energy and other sensitive national policies connected with uranium. We are sure that your concerns in this regard are equal to ours.

. . .

Moreover, the issues raised by the TVA litigation involve extremely sensitive questions of relations among nations. All nations whose policies are called into question, including the United States, were acting pursuant to their own perceptions of national self-interest. If at any time these interests are thought to be inconsistent, the proper method for resolution is good faith government-to-government negotiation. The use of private party litigation to resolve such differences of opin-

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[79] Brief of the Government of Australia as *Amicus Curiae*, filed in the U.S. Court of Appeals for the 7th Circuit (October 19, 1979), p. 8.

ion is inconsistent with all established notions of international relations.[80]

C. *South Africa*

1. The South African Government respectfully suggests, furthermore, that such extraterritorial application to non-U.S. uranium producers, acting lawfully in terms of their own national laws and international law, would constitute a challenge to the sovereignty of nations and could disturb friendly relations with the United States. In the view of the South African Government, the legal and economic implications of such application would extend beyond the business activities and financial position of the South African companies concerned and the uranium industry with which they are associated.[81]

2. The interest of the South African Government in this litigation arises from the attempted application of United States antitrust laws to activities carried on outside the United States by South African companies acting in compliance with South African law and South African Government policy. It also arises from the fact that decisions made in the course of this litigation are likely to have serious effects on international trade and commerce ex-

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[80] Memorandum from Government of France to U.S. Department of State (October 27, 1978), pp. 2, 5.

[81] Memorandum of Government of South Africa as *Amicus Curiae*, filed in U.S. District Court, N.D. Illinois (August 16, 1979), pp. 11-12.

tending beyond the confines of the uranium industry and could well impair friendly relations between South Africa and the United States.[82]

D. *United Kingdom*

[I] . . . want to take this chance to highlighting a few cases in which good relations between our countries are being impaired by the extent to which the laws of the United States, whether as a result of the intentions of Congress or the interpretation of the courts, are applied in practice beyond your own frontiers. This is not a new problem: it has been a matter for contention with some of your overseas partners and friends for decades. Preeminently this happens in the complex field of anti-trust law.[83]

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[82] Brief of the Government of South Africa as *Amicus Curiae*, filed in U.S. Court of Appeals for the 7th Circuit (October 19, 1979), p. 4.

[83] Address by the Rt. Hon. John Nott, M.P., British Secretary of State for Trade (September 14, 1979), pp. 6-7.

APPENDIX Z

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

Nos. 11775, and
Nos. 11988 and 12052
(Consolidated)

UNITED NUCLEAR CORPORATION
Plaintiff-Appellee,

v.

GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,
Defendant-Appellant,

and

INDIANA AND MICHIGAN ELECTRIC COMPANY,
Defendant-Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that General Atomic Company, the Defendant-Appellant above-named, hereby appeals to the Supreme Court of the United States from the then interlocutory decision of this Court entered on May 7, 1979 in No. 11775, and from the final decision of this Court entered on August 29, 1980, in Nos. 11988 and 12052 (Consolidated), rehearing denied, October 23, 1980. This appeal is taken pursuant to the provisions of 28 U.S.C. § 1257(2).

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[Filed January 7, 1981]

CERTIFICATE OF SERVICE AND MAILING

I hereby certify that a copy of this Notice of Appeal to Supreme Court of the United States has been mailed to the following opposing counsel of record: BIGBEE, STEPHENSON, CARPENTER, CROUT & OLMSTEAD, P.O. Box 669, Santa Fe, New Mexico 87501 and JOHNSON, BROMBERG, LEEDS & RIGGS, 4400 Republic National Bank Tower, Dallas, Texas 75201, counsel for United Nuclear Corporation; JAMES T. PAULANTIS, ESQ., P.O. Box 14738, Albuquerque, New Mexico 87111, SIMPSON, THACHER, & BARTLETT, One Battery Park Plaza, New York City, New York 10004 and SIMPSON, THACHER & BARTLETT, Room 23—Bishop Building, 123 West Palace, Santa Fe, New Mexico 87501, attorneys for Indiana and Michigan Electric Company, this 7th day of January, 1981. By this service, all parties required to be served have been served.

By: /s/ Bruce L. Herr
BRUCE L. HERR